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No. 78-5937

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

VENTURA E. YBARRA,

Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Appellate Court Of Illinois,
Second District

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

The State of Illinois accepts Appellant's statements in those portions of his Brief labeled "Opinions Below", "Jurisdiction", and "Constitutional Provisions and Statutes Involved".

QUESTIONS PRESENTED

1. Is it reasonable, under the Fourth Amendment and this Court's decisions in the *Terry* v. *Ohio* line of cases, for officers executing a search warrant seeking heroin allegedly being offered for sale in a small tavern to frisk all patrons present at the time?

2. Did the frisk of Ybarra yield probable cause to believe he was carrying a controlled substance specified in the search warrant, making the search reasonable regardless of any statutory authorization?

3. Alternatively, did the lower courts constitutionally apply Ill. Rev. Stat., Ch. 38, § 108-9, to this case when they held that it permitted a search of Ybarra for controlled substances based on a reasonable belief that he might be concealing on his person the drugs sought in the warrant?

STATEMENT OF THE CASE

The State of Illinois accepts the "Statement" contained in Appellant's Brief as being accurate and sufficient for an understanding of this appeal, with the exception of the following errors or omissions:

The complaint for a warrant to search the Aurora Tap did indicate that patrons of the tavern were involved as purchasers in illegal narcotics traffic. The complaint stated that the informant had been in the tavern on at least ten other occasions and had observed tinfoil packets on the bartender, Greg, and in a drawer behind the bar; the informant stated that he had a recent conversation with Greg and was advised that Greg would have heroin for sale on Monday, March 1, 1976, the date of the complaint for search warrant. (A. 3) The informant also advised that during the weekend on which he had the conversation with Greg, he had observed 15 to 25 tinfoil packets on Greg's person and behind the bar and that he was aware that tinfoil packets are a common method of packaging heroin. (A. 3) The Return to the executed search warrant lists, among other items seized during the search of the Aurora Tap in addition to the tinfoil packets taken from Ybarra, two baggies of a "green plant-like substance" and "hypodermic needles". (A. 7)

At the suppression hearing in State court, agent Jerome Johnson of the Illinois Bureau of Investigation answered affirmatively to a leading question by defense counsel, that he had not found anything upon Mr. Ybarra during his first search, in the context of several questions seeking any overt actions that might have been observed or any weapons that might have been found on the first search of Mr. Ybarra. (A. 28) However, when specifically questioned in a chronological fashion by the prosecutor, agent Johnson described the first search of Ybarra as being "more or less a pat down, cursory search for weapons for our protection". He then stated that

during this search he felt "a cigarette pack with objects in it". (A. 32) Johnson then searched the other patrons and returned a few minutes later to conduct a search of Ybarra's pockets specifically. (A. 32)

Following defendant's bench trial, his attorney once again argued that the tinfoil packets of heroin had been unconstitutionally taken from his client and the trial judge once again dealt with this question. (A. 68) He further explained his ruling on the Motion to Suppress by saying:

> I do not agree as a matter of fact that there is no probable cause to search the defendant consistent with those cases that you just cited. Certainly to say that there was no probable cause would be a conclusion, and that would have to stand on the facts in the case and not what any agent thought or what anyone thought it would be, what the facts were, and in line with those cases that it is reasonable to search people in that situation, I never intended to make a finding there was not probable cause to search, but I still have to limit it between the framework of the cases the State cited. Motion denied, finding will be guilty. (A. 68-69)

The Appellate Court's holding that the Aurora Tap was frequented by persons illegally purchasing drugs was based upon the complaint for search warrant, the last two paragraphs cited above. (A. 3)

SUMMARY OF ARGUMENT

I. Appellee submits that, under *Terry* v. *Ohio*, 392 U.S. 1 (1968) and its progeny, the first pat-down search of Ybarra was a reasonable frisk, which yielded probable cause to believe that he had concealed on his person the controlled substances sought in the search warrant. The serious nature of the contraband sought (heroin), the general experience of drug enforcement officers with heroin dealers and users, the informant's revelation that drug sales would take place that day, the relative numbers of patrons and police and the character of the premises being searched all combined to convince reasonable officers that a weapons search was necessary for their safe execution of the warrant. The original frisk of Ybarra for weapons was not more intrusive than necessary to discover possible weapons in his outer clothing.

During the frisk Agent Johnson felt a "cigarette pack with objects" (apparently not cigarettes) in it. When he returned to Ybarra again after frisking other patrons, Johnson relocated the objects and retrieved them from defendant's pants pocket, discovering that they were tinfoil packets of the type sought in the warrant. Having information about planned tinfoil-packaged heroin sales at the tavern that day, inferring that sales would be to persons patronizing the small tavern, and knowing that cigarette packs, not normally used for anything but cigarettes, would be serviceable drug containers, Johnson had probable cause after the weapons frisk to believe Ybarra was carrying some of the illegal narcotics which would be or had been sold at the Aurora Tap. Contraband discovered as a result of a lawful frisk is sizeable without a warrant and admissible into evidence.

Probable cause is an objective standard determined from the facts of record and judicially noticed, all to be considered by the reviewing court. The court's determination of probable cause cannot depend on whether the searching officer knew

there was probable cause at the time or whether he was led through a legal analysis of the probable cause factors during the suppression hearing.

Since independent probable cause and exigent circumstances gave rise to Johnson's second search of Ybarra which yielded the packets of heroin, application of the Illinois Statute, Ch. 38, § 108-9(b), is not necessary to uphold this search and seizure. Judicial restraint dictates, therefore, that no decision be made on the constitutionality of the statute since it was applied to a search conforming in every way to Fourth Amendment requirements.

II. Alternatively, if this court's interpretation of the Record prevents it from viewing the first pat-down as a lawful frisk producing probable cause to search Ybarra for packets of heroin, the appellee submits that both searches were justified by Ill. Rev. Stat., Ch. 38, § 108-9(b), as properly construed and applied by the Illinois courts. The statute as interpreted does *not* allow automatic full searches of all unknown persons found on any premises being searched pursuant to a warrant. It has been construed and applied so as to require a reasonable connection between the person being tactilely searched and the premises, or between a person being searched and the criminal activity on the premises.

The officers executing the instant search warrant for the Aurora Tap had information (already accepted by an impartial issuing judge) that tinfoil packets had frequently been seen behind the bar by a patron and that such packets containing heroin would be available for sale at the bar on March 1, 1976. Contained within this information was the undeniable inference that some patrons of the small tavern were the intended purchasers of the heroin sought in the warrant. The patrons in the tavern while the warrant was being executed were people connected with the tavern by their choice to be present in a place where possession and sale of narcotics were rather open

and notorious. If they could not be patted-down as part of the premises search, then the warrant's purpose would likely be defeated as some or all of the patrons walked out with some or all of the objects sought. This result would cause the search warrant, the constitutionally preferred foundation for all official searches, to be brought into disrepute in the eyes of drug enforcement officers and drug violators alike.

In the circumstances of a narcotics raid on a public establishment with a warrant, there is no way to list in advance in the complaint everyone who will be present on the premises when the warrant is executed. Nor will simple observation or inquiry usually allow officers to determine with probable cause which of the patrons are involved in narcotics trade.

Thus, traditional probable cause to search an individual patron for drugs (and of course the warrant preferrence with its attendant delay) will frequently be an insurmountable obstacle to the full execution of the already issued premises search warrant. Probable cause should therefore not be required for a pat-down of patrons in these situations.

The balancing of governmental and private interests with various types of intrusions, the test employed by this Court to permit searches on less than traditional probable cause in *Terry* v. *Ohio,* 392 U.S. 1 (1968) and *Camara* v. *Municipal Court,* 387 U.S. 523 (1967) should again be employed to validate the present search and the application of Ch. 38, § 108-9 in this case. The legitimate needs of law enforcement officers executing narcotics search warrants should be met by a rule allowing a pat-down search (a limited intrusion) of persons on compact premises where the complaint alleges drug sales occurred or were scheduled and the officers have a reasonable belief (suspicion) that the persons present are connected to the premises or to the criminal activity.

ARGUMENT

I.

FOLLOWING A LAWFUL WEAPONS FRISK WHICH REVEALED THE FORM OF A CIGARETTE PACK WITH OBJECTS IN IT, THE SECOND SEARCH OF YBARRA WAS BASED UPON PROBABLE CAUSE TO BELIEVE HE WAS CARRYING IN HIS POCKET A CONTROLLED SUBSTANCE SPECIFIED IN THE TAVERN SEARCH WARRANT; THE SEARCH DURING EXECUTION OF A WARRANT WAS THEREFORE REASONABLE UNDER THE FOURTH AMENDMENT, REGARDLESS OF ANY SPECIFIC STATUTORY AUTHORIZATION.

Although the Illinois Appellate Court did not rely on this analysis in affirming the conviction and the trial judge only mentioned the separate weapons search in denying the motion to suppress (A. 43), appellee submits that Ybarra's conviction should be affirmed because the first pat-down search of his person was a reasonable frisk, under *Terry* v. *Ohio,* 392 U.S. 1 (1968) and its progeny, which then yielded probable cause to believe that Ybarra had some of the controlled substances sought in the search warrant in his pocket. Once there was probable cause to believe packets of heroin could be found on him, the second pat-down and search of Ybarra met the standard Fourth Amendment requirement for a valid search in exigent circumstances, where obtaining a warrant would either allow the contraband to be disposed of or would constitute a greater intrusion on the privacy of the person being searched.

A.

It Is Always Reasonable For Officers To Frisk All Fully Clothed Adults On The Premises, Where The Officers Are Executing A Search Warrant For Heroin And The Complaint Has Informed Them That Some Or All Of These Persons Are Users And/Or Dealers In Heroin.

When this Court upheld the pat-down search of three possible "stick-up" men based on an officer's *reasonable belief* that they may have been carrying weapons rather than on probable cause, in *Terry* v. *Ohio,* 392 U.S. 1 (1968), the Court observed that " certainly it would be unreasonable to require police officers to take unnecessary risks in the performance of their duties." "American criminals have a long tradition of armed violence and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded." 392 U.S. at 23. Later in *Adams* v. *Williams,* 407 U.S. 143 (1972), where an officer had received an informant's tip that a man seated in an automobile nearby had narcotics and a pistol in his possession, this Court upheld the officer's quick search for and seizure of the weapon even though it found that the unverified tip "may have been insufficient for a narcotics arrest or search warrant" and even though the officer could not be certain that the defendant lacked a permit for carrying the weapon. Noting that the officer was operating alone in a high crime area at 2:15 a.m., the Court found that the officer had ample reason to fear for his safety on the basis of the informant's information. 407 U.S. at 147. Of course, once he acted, the officer found not only a fully loaded revolver in the defendant's waist band but also substantial quantities of heroin, a machete and a second revolver hidden in the automobile.

Similarly, in *Pennsylvania* v. *Mimms,* 434 U.S. 106, 98 S. Ct. 330 (1977), this Court held that it was always reasonable under the Fourth Amendment for an officer who has lawfully

detained the driver of an automobile for a traffic violation to order the driver out of the car to establish a face-to-face confrontation and reduce the likelihood that the officer will be the victim of an assault. "We think it too plain for argument that the State proferred justification—the safety of the officer—is both legitimate and weighty." 98 S. Ct. at 333. The Court noted a study which showed approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile.

In all of these cases this Court employed a balancing test to determine the reasonableness of the police procedures involved. The balance that was sought was one between the public interest and the individual's right to personal security free from arbitrary interference by law officers. In each of these three cases the requirements of the officers' personal safety were found to outweigh the limited intrusions involved in the frisks or the order to alight from an automobile.

As recognized by many courts and commentators, officers executing a lawful warrant to search for heroin also put themselves in physical danger through the performance of this court-ordered duty. The danger may be even greater than that confronting an officer making a stop on the highway or interrogating suspects on the street. Professor Wayne LaFave in his new treatise, *Search and Seizure* (1978), finds an apt analogy between the *Terry* street encounter situation and the search warrant execution situation where persons are present on the premises to be searched. In noting that the lower courts have required a lesser showing than is required in the *Terry* confrontation that the persons to be frisked in the search warrant situation may be armed and presently dangerous, Professor LaFave observes:

> In weighing the need for a frisk incident to execution of a search warrant, it is appropriate to take account of 'the increased likelihood of danger to the officer *if* in fact the person is armed.' This 'increased likelihood' results in the search warrant situations because more than a 'momentary encounter' is involved, and thus if the person does have a weapon 'he will certainly have much more opportunity to use it against the officer.' The opportunity is greater not only because the suspect and the officer will be in close proximity for a longer period of time, but also—as noted earlier—because the officer's investigative responsibilities under the warrant require him to direct his attention to the premises rather than the person. *Search and Seizure* at § 4.9, pp. 150-151. (Footnotes omitted).

As to frisks in general following any type of stop made by an officer, Professor LaFave notes, apparently with approval, that "lower courts have been inclined to view the right to frisk as being automatic whenever the suspect has been stopped upon the suspicion that he has committed, was committing or was about to commit a type of crime for which the offender would likely be armed, regardless of what the purpose of the weapon might be . . ." *Id.*, Sec. 9.4, p. 116. This principle applies in several categories of serious offenses including dealing in large quantities of narcotics. Sec. 9.4, p. 116.

Many courts have recognized that there is inherent physical danger to police officers in searching or arresting persons involved in narcotics traffic. The United States Court of Appeals for the Second Circuit described firearms as being "tools of the trade" of narcotics dealers in *United States* v. *Oates,* 560 F. 2d 45 (2nd Cir. 1977), and noted that it would be reasonable for a policeman to assume that one of the top narcotics violators in the New York area would be carrying arms or be otherwise be violent in *United States* v. *Santana,* 485 F. 2d 365 (2nd Cir. 1973). In upholding the pat-down of a defendant when he entered the apartment where an illegal drug search was being conducted and drugs had been found, the Supreme Court of Wisconsin noted the increasing numbers of attacks on police officers in recent years and said:

> That fact and the factor of clear and present danger to law officers searching premises, particularly for narcotics, is not to be ignored in evaluating the reasonableness of a precautionary pat-down for weapons under the circumstances before us. A police officer in such circumstances ought not to have to wait until the pistol is pointed and the trigger pulled to have his suspicion confirmed that the person on the premises of a place being searched was armed .... To hold otherwise would be to sign a judicial death warrant for law officers assigned in the future to conduct searches for illegal drugs and certain to encounter the same situation faced by the two Kenosha police officers in this case. *State* v. *Chambers,* 198 N.W. 2d 377, 383 (Wis. S. Ct. 1972).

A year later the criminal court of the City of New York in a narcotics search warrant case where a weapon was discovered on the person of an unknown visitor to the apartment, ruled that:

> It is generally known by the police and others that those who traffic in large quantities of narcotics are often armed. Officer Forte was also apparently cognizant of this possibility when he frisked the defendant 'for my protection' as he testified. The mere presence of a person or persons in such an environment presents that reasonable suspicion and belief which gives rise to sufficient and legal justification to frisk all present for weapons, at the very least. Indeed, the correctness of the belief was borne out by the discovery of a loaded weapon. We cannot, in deciding what is reasonable, close our eyes to the realities of the danger of police duty viewed in the context of such a dire situation. (citation omitted). *People* v. *Finn,* 340 N.Y.S. 2d 807, 816 (Crim. Ct. N.Y., Bronx Cty. 1973)

See Concurring Opinion of Justice Harlan in *Sibron* v. *New York,* 392 U.S. 40, 74 (1968) leaving open the question of automatic frisks in "suspected possession of narcotics cases" but recognizing need for automatic frisks where the nature of the crime creates a substantial likelihood that the criminal is armed.

At least two courts in upholding the propriety of frisks carried out on persons present during execution of narcotics search warrants, have quoted testimony of officers demonstrating that persons arrested for narcotics offenses are frequently armed. In *United States* v. *Mack,* 421 F. Supp. 561, 563 (W. D. Pa. 1976), *aff'd.* 568 F. 2d 771 (Table)(3rd Cir. 1978), the searching officers testimony was that a "high percentage of persons arrested for narcotic offenses in recent years are found to be armed". The court ruled that:

> The Supreme Court in *Terry* v. *Ohio* ... has established the legality of such preliminary searches when the surrounding circumstances are such that the police officers must pursue the investigation without the fear of violence .... In fact the circumstances of this case indicate to the court that the police officers would have been remiss in their duties if they had failed to search defendant. We fail to find any distinction here on the ground that the 'pat and frisk' search in *Terry* v. *Ohio* was done on the streets whereas the search here was done in defendant's dwelling house. The circumstances of defendant's appearance at the dwelling during the search give the police officers the same reason to frisk as they would have in the street situation. 421 F. Supp. at 563.

In *State* v. *Sloughter,* 545 P. 2d, 32 (Wash. App. 1976) an officer executing a narcotics search warrant at the home of a dealer patted down another person present at the time and found cocaine. On the motion to suppress he testified that, among other facts, fifteen to twenty percent of all persons he had arrested for drug related offenses in the past were armed with some type of weapon capable of producing bodily harm, such as a gun, knife or razor blade. The Washington Court upheld the pat-down of the defendant's clothing saying:

> The concern of the court in *Terry* for the protection of an officer in the lawful performance of his duties is even more pertinent today. Since that decision, it is a matter of common knowledge that the incidence of armed violence has dramatically increased. This is not surprising in view

> of the virtually unchecked accessibility to and use of all types of deadly weapons. To require an officer, in the circumstances of this case, to await some furtive movement of the defendant before a protective pat-down search of weapons could take place would compound the officer's exposure to danger.
> 545 P.2d at 35.

Closely analogous to the situation in the present appeal, Arkansas officers executing a search warrant at a bar in which the defendant was employed, having information that substantial amounts of narcotics were dealt at the bar and believing that a majority of the bars habitués were armed, initially secured the establishment and patted down all persons present for weapons. The Supreme Court of Arkansas found this to be a reasonable practice in *Colding* v. *State,* 536 S. W. 2d 106 (Ark. S. Ct. 1976). Several other courts have, without elaboration, upheld the right of police officers executing a narcotics search warrant to pat-down persons present for their own safety. *United States* v. *Branch,* 545 F. 2d 177, 186 note 24 (D.C. Cir. 1976); *Guzman* v. *Estelle,* 493 F.2d 532, 535 note 10 (5th Cir. 1974); *United States* v. *Peep,* 490 F.2d 903, 905 (8th Cir. 1974); *State* v. *Yarbrough,* 552 P. 2d 1318 (Or. App. 1976); *People* v. *Nefzger,* 476 P. 2d 995, 996 (Col. S. Ct. 1970); and *State* v. *Long,* 246 S. E. 2d 846 (N.C. app. 1978), *appeal dismissed,* 248 S. E. 2d 866 (1978 N.C. S. Ct.)[1]

In the last opinion cited above the North Carolina Court of Appeals, in admitting evidence found by air force investigators during a frisk of the defendant conducted just prior to a search of his home, held that "a limited frisk or search for weapons is

[1] Indeed, many decisions cited by appellant for the unreasonableness of searches conducted on less than probable cause, pursuant to an Illinois-type statute, do recognize the validity of a frisk for weapons in narcotics search warrant cases. *State* v. *Mendez,* 565 P.2d 873 (Ariz. S. Ct. 1977); *State* v. *Bradbury,* 243 A.2d 302 (N.H. 1968) *Smith* v. *State,* 289 So. 2d 816, 818 (Ala. S. Ct. 1974).

reasonable and may be constitutionally made of all individuals present in a private residence when the residence is searched pursuant to a valid search warrant based upon probable cause to believe that the residence is the place in which heroin and other controlled substances are bought an sold and that such contraband is then present." 246 S.E. 2d at 851. In reconciling that holding with *Terry* v. *Ohio,* the court stated:

> Although such frisks do not technically constitute a so-called 'stop and frisk' procedure, we find this to be one of those 'carefully defined classes of cases' referred to in *Terry,* which make up an exception to the warrant requirement and that such searches are reasonable. Certainly, if an officer may, without the benefit of either a search warrant or an arrest warrant stop individuals he has observed engaging in unusual conduct on a public street after concluding that they contemplate a crime and are armed as in *Terry,* searches such as those presented by the present case are reasonable and, therefore, constitutional. 246 S. E. 2d at 851.

The same valid reasoning allows that Court's holding on the propriety of limited frisks to be extended also to public places such as the compact one-room neighborhood bar involved in the instant case.

It is relevant to and supportive of the above decisions to note that, of twenty-seven narcotics cases researched and mentioned in this brief, six involved searches which uncovered weapons either on the person involved in the search or on his premises. This amounts to 22% of the 27 cases mentioned. In reviewing the 90 separate Chicago Police Department files where search warrants were executed, mostly for narcotics and related paraphernalia, mentioned in the amicus brief filed by the Americans for Effective Law Enforcement in the present case, Brief at page 11-13, weapons were found by police officers either on a person present during the search or on the premises in 48 of the cases, which is 52% of the total.

A United States Drug Enforcement Administration Study of assaults on its agents between July 1975, and December, 1976, showed that of 72 domestic assault incidents during that time, 25 occurred during the execution of warrants or in related circumstances. Of that 25 almost half, or 12 assault incidents, arose from search warrant or related situations. *Assaults on DEA Agents,* U.S. Department of Justice, DEA, (1978) (excerpts printed in Appendix A to this brief) See Section II.

In their defense lawyers' guide, *Handling Narcotics and Drug Cases,* (1972), F. Bailey and H. Rothblatt, at sections 3 and 5, comment on the desperation of hard drug users to obtain their narcotics and avoid withdrawal effects. In section 6 these two well-known defense lawyers assert that the drug user is "unreliable" as a client and lives in a "fantasy world."

Based upon all the above decisions and information, the State of Illinois requests this Court to analogize the confrontation of police officers executing a search warrant for heroin, amidst persons on the premises where the drug is being sold and/or used, with the on-the-street encounters addressed in *Terry* v. *Ohio.* This Court made a similar analogy once before to authorize a brief stop by roving border patrols in *United States* v. *Brignoni-Ponce,* 422 U.S. 873 81-82 (1975). According to the principles for determining reasonableness used by this Court, the pat-down at issue in the present case was proper. The State's interest in ensuring the safety of the drug enforcement officers, who undertake to execute search warrants for dangerous drugs on premises where many individuals unnamed in the warrant will be present, must outweigh the individuals' interest in not being subjected to a limited intrusion which the pat-down involves. It is possible for an objective standard to be devised which would allow this type of frisk without allowing unbridled discretion in the officers on the scene of a search warrant execution. *Cf. Delaware* v. *Prouse,* ____U.S. ____U.S. ____, 99, S. Ct. 1391, 1396 (1979).

The State asks that this Court allow a limited pat-down search for weapons of all fully clothed persons old enough to carry them on the premises *where a search warrant is being executed for heroin* or similar hard, mind-altering narcotic drugs, where the officers do not have reason to believe that the persons on the scene have no relationship whatever to the premises or to the drugs being sought. Such a ruling by this Court will ratify under Fourth Amendment theory an already existing police practice which does embody neutral criteria and which is essential for safe and effective execution of narcotics search warrants.[2] *United States* v. *Oates,* 560 F.2d at 62; *People* v. *Finn,* 340 N.Y.S. at 813, note 5.

In the present case, application of the *Terry* rule adapted to the execution of search warrants clearly shows that the IBI agents' frisk of all persons at the Aurora Tap on March 1, 1976 was reasonable under the Fourth Amendment. The search warrant issued to the officers was for heroin and other controlled substances, heroin being one of the most dangerous and most valuable of all controlled substances. (A. 5) The agents knew from the complaint that packets of heroin had been seen on the bartender and behind the bar on several occasions and that the bartender, Greg, planned to sell heroin to the informant and most likely others in the tavern on March 1, 1976. (A. 3) When the agents entered the Aurora Tap to execute their warrant there were approximately 12 persons on the premises. (A. 26, 31 and 48) Ybarra was wearing a 3/4 length lumber jacket (as one would expect of most patrons in March).

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[2] See the Drug Agents Guide to Search and Seizure, U.S.D.E.A. (1978), Appendix B to this Brief, p. 83 of the Guide, under the heading "Protective Measures" wherein agents are instructed, subject to Department restrictions, they may do whatever is necessary and proper under the circumstances to execute a warrant, including restricting the movement of persons on the premises to protect themselves and to prevent interference and frisking persons found on the premises.

(A. 31, 57) Only 7 or 8 officers were present when the search warrant was executed on the Aurora Tap. (A. 24; Appellant's Brief p. 9) Under these circumstances it was reasonable for the police officers to believe that, even if some officers were assigned to watch the patrons while others searched, their safety might be endangered by an attack from an unknown user of/or dealer in heroin who would have a weapon and use it in desperation. Of course, if most or all of the persons in this tavern were associated with the narcotics trade and several of them had weapons, it might have been possible for them to over-power and escape from the officers by virtue of their greater numbers and a surprise use of force.

B.

Once Agent Johnson Felt The Cigarette Pack With Objects In It, He Had Probable Cause To Believe Those Objects Were Packets Of Heroin Or Other Controlled Substances And Was Entitled To Seize Them Without A Warrant Due To The Exigent Circumstances.

During the initial frisk of Ybarra, agent Johnson felt something that he described as "a cigarette pack with objects in it". (A. 32) He did not immediately remove this from Ybarra's pocket, apparently because he was still in the process of frisking the other customers. When he had completed this task, he returned to Ybarra, patted him down once again to relocate the objects and retrieved them from defendant's pants pocket. (A. 28-32) On retrieving the objects from Ybarra's pants pocket, Johnson discovered that they were tinfoil packets of the type sought in the warrant. (A. 50)

Having the informant's information that on many occasions he saw tinfoil packets behind the bar at the Aurora Tap and knowing that the bartender promised to sell heroin to the informant on the day of the search, Agent Johnson was entitled to infer that at least some sales of heroin would be made to persons patronizing the Aurora Tap. Once he felt the cigarette

pack with objects in it during the frisk of Ybarra, he could reasonably conclude that such a potential and serviceable drug container [see *United States* v. *Robinson,* 414 U.S. 218, 223 (1973)] was indeed carrying tinfoil packets of heroin which would be or had been sold at the Aurora Tap. These are the identical items sought in the search warrant. Based on these pieces of information and observed facts, a reasonably prudent man would be warranted in concluding that Ybarra had tinfoil packets of heroin in the cigarette pack in his pocket and was thus committing the offense of possession of heroin at that moment and that the object of the search warrant would be defeated unless those packets were retrieved from him. See, *Brineger* v. *United States,* 333 U.S. 160 (1949).

Of course, it is irrelevant whether or not Agent Johnson understood the concept of probable cause at the time he was making the search or whether he was properly lead during his suppression hearing testimony through an analysis of all the various probable cause factors and the basis therefor. The probable cause standard is an objective one to be determined from all the facts of record and those judicially noticed; the determination is one for the court. *Terry* v. *Ohio,* 392 U.S. at 21-22.

> And in determining whether the officer acted reasonably in such circumstances due weight must be given . . . to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. 392 U.S. at 27.

It is true that Agent Johnson was not given the opportunity during direct or cross examination at the suppression hearing to itemize and explain all the factors which gave him probable cause to conduct the second search and retrieve the heroin packets from Ybarra's pocket. Nevertheless, there are enough facts contained in the complaint for the search warrant, in the generally recognized experience of drug enforcement officers as reflected in the myriad of reviewing court decisions and in Johnson's own testimony to warrant this Court's conclusion that

he had probable cause to believe Ybarra was carrying contraband tinfoil packets.

It seems to be the unanimous holding of the judicial authorities considering the question that any contraband discovered as a result of a lawful frisk is seizable without a warrant and admissible into evidence. *Guzman* v. *Estelle,* 493 F. 2d at 534, 536-37, presented the Fifth Circuit Court of Appeals with a situation remarkably similar to the instant one. The Court held that background facts and a frisk of the defendant for weapons which revealed the form of a rubber fingerstall gave the officers probable cause to believe that the fingerstall contained heroin; they were justified in seizing the item under the circumstances, (when time was of the essence) without a warrant. The Court noted at footenote 16 that if the defendant had been detained to prevent the destruction of the contraband found on him while a warrant was sought, this would have amounted to an arrest, a much greater intrusion and an absolute curtailment of his freedom. Other decisions supporting the same conclusions are *United States* v. *Branch,* 545 F. 2d 177 at notes 11 and 24; *United States* v. *Miller,* 298 A. 2d 34, 36 (D.C. Ct. App. 1971); *State* v. *Howard,* 502 P. 2d 1043, 1045 (Wash. App. 1972); *State* v. *Chambers,* 198 N.W. 2d. at 382; *State* v *Yarborough,* 552 P. 2d at 319; *People* v. *Nefzger,* 476 P. 2d at 996; *State* v. *Muckleroy,* 552 P. 2d 257, 258 (Or. App. 1976). See also *Coolidge* v. *New Hampshire,* 403 U.S. 443, 466-67 (1971) (plurality opinion) and id. at 519 (J. White dissenting opinion).

In his treatise Professor LaFave says that while it may be that the issue remains open, lower courts have consistently admitted evidence other than weapons found in a frisk. 3 LaFave, *Search and Seizure,* (1968), Section 9.4 at p. 139-140. He opines that a contrary rule on admissibility would be a serious departure from present law. In its discussion of the purpose and extent of the exclusionary rule in *Terry* v. *Ohio,* 392 U.S. at 13, this Court said:

> The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections.

See also the reasoning applicable to these conclusions in *United States* v. *Robinson,* 414 U.S. at 226, and American Law Institute Model Code of Prearraignment Procedure, Section 110.2(4) and commentary thereon at pp. 121-122 (1972).

Based upon the record and the above authority it is clear that Agent Johnson's search for the seizure of tinfoil packets of heroin was made upon probable cause. Due to exigent circumstances it could be accomplished without the necessity of obtaining another warrant naming Ybarra personally. Consequently, there is no necessity to construe Ill. Rev. Stat. Ch. 38, § 108-9(b) in order to uphold the seizure of heroin from Ybarra and his subsequent conviction. Judicial restraint dictates, therefore, that no decision be made on the constitutionality of the statute since it was applied to a search conforming in every way to Fourth Amendment requirements. *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring.); *Massachusetts* v. *Westcott,* 431 U.S. 322 (1977).

II.

ALTERNATIVE ARGUMENT

ILL. REV. STAT., CH. 38, § 108-9, HAS BEEN CONSTITUTIONALLY APPLIED TO THIS CASE, WHERE THERE WAS A REASONABLE CONNECTION BETWEEN THE AURORA TAP'S CONTINUING OPEN AND NOTORIOUS NARCOTICS VIOLATIONS AND THE PATRONS PRESENT ON MARCH 1, 1976. ILLINOIS' REQUIREMENT OF A REASONABLE BELIEF THAT PERSONS TO BE SEARCHED HAVE A CONNECTION WITH THE PREMISES/ACTIVITY AND A BELIEF THAT THEY MAY CONCEAL OR DISPOSE OF THE WARRANT'S OBJECTS SATISFIES THE *TERRY* BALANCING TEST.

A. Background Of The Illinois Statute And Its Construction

The trial and appellate courts below relied heavily upon Ill. Rev. Stat., (1975), Ch. 38, § 108-9, to justify their decisions in this case. The statute allows officers executing a search warrant to "reasonably detain to search any person in the place at the time: (a) to protect themselves from attack or (b) to prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant." Similar statutes have been enacted in at least 9 other jurisdictions in the United States.[3] The Illinois provision was made part of the Code of Criminal Procedure of 1963 and the Committee Comment following the provision explained its purpose as follows:

[3] Ariz. § 13-1446(E); Conn. Gen. Stat., Rev. § 54-33b, Ga. Code Ann., § 27-309; Kan. Stat., Ann., § 22-2509; Mont. Rev. Code Ann., § 46-5-209 (1978); Nev. Rev. Stat., § 179.055; N.Y. Crim. Pro. Law, § 690.15; Wis. Stat., Ann., § 968.16; D.C. Code (1973), § 23-524(g).

> The need for a search of the person will not usually arise when the parties are before the judge but rather when the officer first arrives at the place where the goods are to be seized. The protection is given in all cases since the danger to be avoided is always present. In addition, it is clear that the purpose of the warrant would be thwarted were not the officer given the second power found in subsection (b), *i.e.*, to search the person for the things to be seized. The need for this power arises most often in narcotics cases where disposition is most easily effected.
>
> 'Any person on the premises' would include the limits prescribed in the warrant itself.
>
> The committee felt that this section is necessary because it gives the officer a clear outline of his power in executing the warrant and removes doubt from a rather cloudy area of the law. Furthermore, if a judge decides there is probable cause for issuing the warrant in the first place, then this power given to the officer which is parasitic to the warrant should not be considered excessive in the hands of the executing officer.
> S.H.A., ch. 38, § 108-9.

It apears that at least five of the jurisdictions that have statutes similar to Illinois' section 108-9 enacted them after 1963, and some of them many years after that time. Arizona, Kansas, New York, Wisconsin and the District of Columbia are all in this category. It is interesting to note that when Wisconsin adopted its version in 1969, the legislative comment following the provision expressed essentially the same reasons as were expressed in the Illinois comment above, although in briefer form. The Wisconsin comment states:

> If this power is not given, the effectiveness of a search warrant may be thwarted by a person or persons on the premises searched by concealing, on their person, the items subject to seizure.
> Wis. Stat., Ann. § 968.16.

Additionally three states have granted officers executing a search warrant powers almost identical to those contained in

the Illinois Statute by providing the power in the established form of warrant itself, rather than in a separate enabling statute.[4]

As the Supreme Judicial Court of Massachusettes said in *Commonwealth* v. *Smith,* 348 N.E. 2d 101, 103 (Mass. 1976):

> "There is no general agreement in either holding or reasoning among the courts which have considered whether the search of any person present pursuant to a valid premises search warrant is a reasonable search under the Fourth Amendment."

Professor LaFave notes in his treatise *Search and Seizure (1978),* Vol. 2, § 4.9(c), that some courts have struck down searches which had been predicated upon the warrant powers cited above as being unconstitutional general searches, while other courts have upheld such searches under the statutory power conferred. LaFave believes that these apparently contradictory decisions can be reconciled upon closer examination of their facts. He maintains:

> The principle which emerges from these decisions is that it is not constitutionally permissible 'to search a person, not connected in any way with the place being searched, who merely happens to be on the premises and who is not mentioned or described in the affidavit of probable case upon which the warrant was issued'. Rather, 'the law requires that there be probable cause to believe that such persons are themselves participating in criminal activity' or, somewhat more precisely, that there be probable cause that evidence which might be concealed or destroyed is to be found upon the person searched.
> *Search and Seizure,* Vol. 2, § 4.9(c) at p. 144.

Appellee agrees from a survey of the decisions that the courts upholding searches pursuant to a provision such as Illinois'

[4] Del. Code Ann., Title 11, § 2310; Mass. Gen. Laws, Ann., ch. 276, §2A; N.H. Rev. Stat., Ann. §696-A:3.

§ 108-9 have required a connection between the persons to be searched and the place mentioned in the search warrant. However, such decisions have *not always required probable cause* to believe that such a connection exists or that the persons on the premises were involved in the criminal activity to which the warrant is directed.

The State of Illinois submits that under circumstances where these statutory powers are being employed by drug enforcement officers during search warrant raids on premises where hard narcotics are being sold, it is not necessary that there be full traditional probable cause to connect unknown persons on the premises to the persons or things to be searched by warrant, in order to constitutionally justify searches of the unnamed persons.

The Illinois Supreme Court has not as yet authoritatively construed Chapter 38, § 108-9. Illinois Appellate Court decisions which have construed the statute are of rather recent vintage and are all agreed that the statute does *not* authorize the search of any person found on any premises where a search warrant is being executed regardless of the circumstances. Illinois courts have been sensitive both to the constitutional danger of allowing the statute to transform otherwise valid specific warrants into general warrants and to the legislature's concern that objects sought by warrant will avoid discovery if persons on the premises are immunized from search in all but the most obvious cases of complicity.

In its opinion in the present case the Illinois Appellate Court, Second District, indicated that there were decided limits on the use of section 108-9(b), when it stated that it would not authorize a blanket search of persons or patrons found in a large retail or commercial establishment. The court pointed out in the present case that the search was conducted in a one-room bar where it was obvious from the complaint of the officer seeking the search warrant that heroin was being sold or

dispensed. The court reiterated that each case must be decided upon its own facts. Finding a reasonable application of the statute in this case, the court therefore held that section 108-9 was not unconstitutional in its application to the present facts. (Opinion at A., pp. 84-87)

Two years ago the Illinois Appellate Court, First District, in *People* v. *Dukes,* 363 N.E. 2d 62 (Ill. App. 1977), held that § 108-9 did not authorize the search of persons "on the premises described in the warrant without some showing of a connection with those premises, that the police officer reasonably suspected an attack, or that the person searched would destroy or conceal items described in the warrant." 363 N.E. 2d at 64. The Court ruled that the statute could not be used to sanction automatic searches of any person who may happen upon the premises during execution of a warrant because such an interpretation would afford no protection to innocent strangers having no connection whatsoever with the premises. In that case the defendant had knocked on the door of an apartment being searched pursuant to warrant for gambling material. The same court most recently in *People* v. *Gloria Miller,* ____ N.E. 2d ____, (1st Dist. Ill. App., June 25, 1979) (see opinion attached hereto as Brief Appendix C) construed section 108-9 more explicitly in light of this Court's decisions in *Delaware* v. *Prouse,* ____ U.S. ____, 47 U.S.L.W. 4323, 99 S. Ct. 1391 (1979) and *Terry* v. *Ohio,* 392 U.S. 1 (1968). Applying the test of balancing the intrusion on an individuals Fourth Amendment interest with the promotion of a legitimate government interest, the appellate court construed the statutory language "reasonably detain to search" to require that the executing officer be able to express at least an articulable and reasonable suspicion that either a search or a detention (or both) is for a purpose enumerated in § 108-9. The court also held that the power allowed by the statute to prevent destruction or concealment of items called for in the search warrant must be strictly limited to allow the search of only those persons on the

premises at the time the warrant was executed. In this case the search had already been completed when the outsider arrived. The *Miller* decision also followed *People* v. *Dukes* in requiring that the record show an indication that the officers knew the defendant had a sufficient connection with the premises to justify the search.

The Illinois Appellate Court, Third District, imposed similar limitations on § 108-9 in *People* v. *Boykin,* 382 N.E.2d 1369 (3rd Dist. Ill. App. 1978). There the court upheld the search of a person found in a residence during the execution of a search warrant, a person who had attempted to flee when the police entered the premises. The court specifically recognized

> "that section 108-9 cannot be read to authorize a routine search of anyone who happens to be on the premises regardless of circumstances. (*People* v. *Ybarra,* [citation omitted]; *People* v. *Dukes,* [citation omitted].) This section does authorize searches where it is shown that the person searched has some connection with those premises, that the police officer reasonably suspected an attack, or that the person searched would destroy or conceal items described in the warrant." 382 N.E. 2d at 1372.

It is important to note that this appellate panel cited the appellate court opinion in the present case as supporting the proposition that 108-9 must be read with certain limitations.

It is thus clear that the Brief Amicus Curiae of the State Public Defender of California in support of appellant is incorrect when, at page 4, it alleges that the Illinois court has authoritatively construed this statute to vest absolute discretion in searching officers to search any person present on premises described in a warrant regardless of the circumstances. Such a statement completely ignores not only the circumspect language of the decision below but also the very clear limitations imposed on the statute by other Illinois courts in recent months. Nevertheless, it is true that the Illinois opinions cited above

have not mentioned a requirement of probable cause to believe that a person on premises being searched under a warrant is concealing or destroying items sought in the warrant. Instead, the Illinois courts talk of the need for a "reasonable suspicion" or "reasonable belief" that such activity is occurring along with a reasonable belief that there is some connection between the person to be searched and the premises.

B. Judicial Authorities From Other Jurisdictions.

The decisions of other state courts interpreting similar statutory provisions have also refused to require full traditional probable cause in order to search a person present on, and connected with the premises listed in the warrant. The Court that has most frequently done so (contrary to the contention of the California amicus brief, supra) is the Georgia Court of Appeals. Recently in *Campbell* v. *State,* 228 S. E. 2d 309 (Ga. App. 1976), U.S. appeal dismissed, 429 U.S. 1083 (1977), the court held that where police armed with a warrant made a drug raid on a residence containing several persons not named in the warrant, there was a valid search of Campbell revealing a small plastic bottle containing cocaine. Discussing the very similar Georgia statutory provision, Code Ann. § 27-309, the court ruled that it allowed a very limited search of persons present on the premises at the time of the search, only to look for weapons or for the items particularly described in the warrant. During a pat-down search the police found a small plastic bottle in the defendant's right-hand pocket. "Whether or not that bottle could be removed from defendant's pocket depended upon whether police reasonably believed that this bottle contained cocaine." The court ruled that under the circumstances here, involving continuous useage, sale and storage of cocaine on the premises, that the police did have a reasonable belief that Campbell's bottle contained cocaine.

This decision is notable also because it is apparently the only other one on the subject that has ever given rise to a direct

appeal to this Court alleging an unconstitutional interpretation of its state's warrant powers statute. However, the appeal was dismissed on February 22, 1977 for want of jurisdiction and certiorari was then denied.[5]

The Supreme Court of Kansas has also upheld a statute identical to Illinois' Section 108-9, interpreting it to allow only reasonable detention and search of a person under the conditions specified. *State* v. *Loudermilk,* 494 P.2d 1174 (Kans. S. Ct. 1972). The Kansas court held that the search warrant issued to seize opium and related instrumentalities from a building where agents had seen opium users coming and going established probable cause to believe that opium was concealed either on the premises or on the persons of those present.

> Narcotics such as heroin, are easily concealed on a person and may readily be disposed of. Where, as in this case, probable cause to believe that a drug is kept or concealed on certain described premises is established to the satisfaction of a proper magistrate, the search of a person found on the premises in the execution of a search warrant is not only reasonable but necessary to secure effective enforcement of the Uniform Narcotic Drug Act.
> 494 P.2d at 1178.

The District of Columbia Court of Appeals in applying Section 23-524(g) of the D.C. Code of 1973 has in two decisions allowed the use of evidence obtained from the search of a person on premises which were examined pursuant to a warrant, on both occasions for gambling equipment and paraphernalia. *United States* v. *Graves,* 315 A.2d 559 (D.C. Ct. of

[5] The question presented in the jurisdictional statement in the *Campbell* appeal was "may a statute pertaining to execution of warrants be held constitutional if it is construed to authorize routine weapon searches in absence of factors required for pat down, and to authorize extension of search expressly permitted by warrant to visitors on described premises in the absence of probable cause to arrest or search such visitors?" 45 U.S.L.W. 3518.

Appeals 1974); *United States* v. *Miller,* 298 A.2d 34 (D.C. Ct. of Appeals 1971). In neither decision did the Court of Appeals require probable cause to believe that persons not named in the warrant but present on the searched premises were carrying objects sought in the warrant. In *Graves* the court noted that an informant had told officers just prior to the execution of the warrant that the people were inside that had the numbers slips on them; the court interpreted this as allowing the officers to reasonably believe that all the persons inside were involved in the gambling activity. The obviously reasonable limitations on the authority to search persons present on the premises being searched pursuant to a warrant were recognized. However, the court found that the search was not unreasonable under the Fourth Amendment and said "We do not believe on these facts that a suspect should be allowed to circumvent a warrant to search premises by the simple device of picking up the illegal object and holding it in his hand or by placing it in his sock. We know of no rule of law that requires such result." 315 A.2d at 561. The court noted there was no indication in the record that any of the people present had been in the searched delicatessen in order to shop.

In *Miller* the police sought to execute a warrant seeking gambling paraphernalia at an after hours bar. When the door was not opened at their request and running was heard inside, they forced the door and patted down approximately 20 persons present to determine if anyone had weapons or gambling paraphernalia. This search revealed a tinfoil packet of narcotics. The court held that the previous finding of probable cause exemplified in the warrant and the reactions of those in the bar when the search was announced combined to give the police "reasonable cause to believe that the occupants possessed, concealed and were about to remove or destroy the evidence for which they had a search warrant." "This belief

alone gave the officers sufficient ground to search the individuals present. *Nix* v. *United States, supra.*"[6] 298 A.2d at 36.

The Supreme Court of Florida held in the case of a gambling raid made pursuant to search warrant in *Samuel* v. *State,* 222 So.2d 3 (Fla. S. Ct. 1969) that the failure to name all the persons to be found on the premises did not make the warrant invalid to authorize the search of such persons. The warrant authorized the search of the building as well as "the person or all persons therein who shall be connected with or suspected of being connected with the operating or maintaining of said gaming or gambling games, devices, equipment and paraphernalia." The court held:

> We think that the section 22 organic requirement [similar to the Fourth Amendment] is satisfied when the judicial determination is made that there is probable cause to believe that the premises are being used for an illegal purpose such as gambling; and that it is entirely reasonable and proper to search persons found on such premises when there are reasonable grounds to suspect—that is believe—that such persons are engaged in or connected with the unlawful activities that are the subject matter of the search. (citations omitted)
> 222 So.2d at 5.

The Supreme Court of Washington made a similar statement in *City of Olympia* v. *Culp,* 240 P. 360, 361-62 (1925) qualifying the right to search persons found on the premises by the

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[6] In this Opinion, the court uses "good cause" and "reasonable cause" interchangeably but speaks of "probable cause" needed for issuance of the underlying warrant. Appellee submits that, in the context of search and seizure, reasonable cause is not as high a standard as probable cause. For example, paraphrasing the lesser standard for stops formulated by *Terry* v. *Ohio,* this Court's Opinion in *U.S.* v. *Brignoni-Ponce,* 422 U.S. at 881-3, uses interchangeably the words "reasonable belief," "reasonable grounds" and "reasonable suspicion." "Reasonable cause" also carries the same meaning as the Terry formulation.

requirement that officers have "reasonable cause to believe" that the persons have articles for which the search is instituted. The words probable cause are not used. The court also said

> Officers making a search of premises under a search warrant may lawfully detain all persons found therein until the search is concluded. Any other rule would frustrate the purposes of the search; the officers would be compelled to stand idly by while the articles for which the search was instituted were carried away.

See also, *VanHorn* v. *State,* 496 P.2d 121, 123 (Okl. Cr. App. 1972) agreeing with the above formulation; *Brown* v. *State,* 498 S.W.2d 343 (Tex. Ct. App. 1973); Drug Agents Guide to Search And Seizure, U.S. D.E.A. (1978) p. 79-80.

Although several state courts have construed their warrant forms or statutes similar to Illinois' Section 108-9 to require full probable cause for the search of unnamed persons on the premises when a warrant is being executed, e.g., *Commonwealth* v. *Smith, supra,* at least six of the decisions cited as being on point by appellant and by the California State Defender *do not* stand for this proposition.[7]

[7] *Willis* v. *State,* 177 S.E.2d 487 (Ga. App. 1970) is not inconsistent with the *Campbell* decision cited above since it upheld search of persons as being reasonable under the Georgia statute when they were gathered together in an apartment where drugs were in a container on a table within easy reach of all of them. The court makes no mention of probable cause in the decision and indeed describes the evidence for the personal search as being "skimpy and marginal [but] sufficient to support the search under the warrant charging a possessory offense and in accordance with Code Ann. Section 27-309 (b)." 177 S.E.2d at 490. Similarly, *State* v. *Cochran,* 217 S.E.2d 181 (Ga. App. 1975), which invalidated the search of individuals in an automobile leaving the premises about to be searched under a warrant "to search . . . the places and persons for the property specified" described as "illegal drugs and narcotics" in "automobiles, on persons and in two buildings located on the premises and curtilage known as the Sunshine Club," held that the search warrant was a general one. There was no limitation in the Cochran warrant, unlike

(footnote continued on next page)

The only authority from this Court which has been quoted as bearing directly upon the present issue is the decision in *United States* v. *DiRe,* 332 U.S. 581 (1948).[8] In that case the government claimed that the search of an automobile passenger

(footnote continued from preceding page)

the warrant in *Willis* and the Illinois statute, limiting it to persons who reasonably might be involved in the unlawful activity. Additionally, the court did not reach the issue of whether the warrant would have been valid as applied to the building housing the Sunshine Club under the circumstances.

The decision in *United States* v. *Branch,* 545 F.2d 177 (D.C. Cir. 1976) noted the difficulty of the present issue but never considered or decided it because the government never made the argument. In *United States* v. *Micheli,* 485 F.2d 425 (1st Cir. 1973) the court in dicta described the rules at either end of the premises search spectrum but did not discuss or confront the persons-on-premises search question presented in this case; the court did, however, allow the search of an unnamed person's briefcase when it had been left on the premises to be searched and the individual was connected with the premises. *McAllister* v. *State,* 306 N.E.2d 395 (Ind. App. 1974) was decided primarily on state procedural grounds involving the failure to incorporate the complaint for search warrant in the body of the warrant itself. The decision in *State* v. *Bradbury,* 243 A.2d 302 (N.H. S.Ct. 1968) is not inconsistent with the rulings of the Illinois courts. The decision invalidated a search of another student found in the dormitory room of an individual who was alleged in the warrant to be keeping marijuana. The court invalidated the search because there was no connection in any way between the individual searched and the place being searched, the indication was that the individual simply happened to be on the premises. The Illinois decisions cited above also require some connection with the premises shown either in the complaint for search warrant or in circumstances occurring at the time of the search.

[8] *Sibron* v. *New York,* 392 U.S. 40 (1968) did not decide any question presented by the instant appeal. Sibron's case was decided on the basis of no probable cause to arrest him and no legitimate suspicion that he was armed or was dealing in narcotics. Justice Harlan even stated that the eight-hour police surveillance had "pointed away from suspicion" of Sibron rather than adding to it. 392 U.S. at 74.

was justifiable as being incident to the right to search the vehicle on probable cause, without a warrant. Yet the government conceded that if an officer was armed with a search warrant for a residence only, he could not search all persons found in that residence. The Court naturally responded negatively to the suggestion that power not allowed to an officer under a warrant could be allowed in a situation of a search without a warrant. This Court did invalidate the thorough search of the passenger in the car where the informer had disclosed counterfeit government coupons, saying:

> We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.
> 332 U.S. at 587.

However, the Court did not decide whether, without Congressional authorization, any automobile is subject to search without warrant on reasonable cause to believe that it contained contraband. There seemed to be great importance ascribed to the fact that in DiRe's case there was no search of the automobile itself and indeed the automobile search doctrine appears to have been simply a pretext on which to search the passengers personally. Importantly, in discussing the doctrine of *Carroll* v. *United States,* 267 U.S. 132 (1925), the Court again held that permitting warrantless searches of automobiles was consistent with the Fourth Amendment primarily because it was in response to the dictates of an Act of Congress. The Court stated:

> Obviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the act was, therefore, unconstitutional. In view of the strong presumption of constitutionality due to an act of Congress, especially when it turns on what is "reasonable", the *Carroll* decision falls short of establishing a doctrine that, without such legislation, automobiles nonetheless are

> subject to search without warrant in the enforcement of all federal statutes.
> 332 U.S. at 585

In the instant case, the General Assembly of Illinois has decided that it is reasonable for officers executing a lawful search warrant to be able to detain and search persons on the premises under reasonable circumstances, especially in narcotics cases. The above dicta in *DiRe* is more supportive of the State's position in the present case than the dicta cited by appellant is destructive of that position.

C. The Important Governmental Interests In Controlling Narcotics and Encouraging Use of Warrants.

In addition to the dictates of common sense, there are, as mentioned above, a goodly number of courts and legislatures that have agreed with the Illinois General Assembly that the urgency of controlling the narcotics traffic and the every-day street realities of that nefarious business require giving officers executing search warrants the power to search unnamed persons on the premises, when there is a reasonable belief that they are connected with the unlawful activity and may be concealing or carrying away the contraband.

> It is well to remember that Congress itself has found that:
> "the illegal importation, manufacture, distribution and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.... Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.... Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic."
> 21 U.S.C. §§ 801(2), (4) & (6).

The Second Circuit Court of Appeals, in upholding the stop of travelers in a narcotics smuggling case on the basis of a need to stop, has described the traffic in the following terms:

> "A significant portion of that need is supplied by the inherent odiousness and gravity of the offense, the societal costs of which, in terms of ruined and wasted lives, are staggering".
> *United States* v. *Oates,* 560 F.2d at 59.

The legislatures of several states (see footnote 3) and the courts of Kansas, the District of Columbia, and Washington cited above have all explicitly stated the need for officers searching under a warrant to have the power to search persons on the premises lest the warrant be made a mockery through the concealment of the objects sought. In *State* v. *DeSimone,* 288 A.2d 849 (N.J. S.Ct. 1972), Chief Justice Weintraub described this as being a power needed by the government to deal with crime.

Professor LaFave in discussing the Illinois statute in a law review article, "Search and Seizure: 'The Course Of True Law . . . Has Not . . . Run Smooth' " 1966, Ill.L.Rev., p. 266, 272 states:

> It is submitted that a realistic appraisal of the situation facing the officer executing a search warrant compels the conclusion that *under some circumstances* a right to search occupants of the place named in the warrant is essential. The unresolved question is what connection must exist between the person and the premises and what other circumstances must be present to justify such action.

LaFave concludes that there must be probable cause to search a particular individual who is found at a place where a search warrant is about to be executed, but he admits that there is a problem where probable cause is lacking and yet persons on the premises may be concealing items sought in the warrant. In his treatise *Search and Seizure,* Vol. 2 at Section 4.9, p. 147, he asks "Are the police powerless to take any steps at all to foreclose the risk that the person may depart the premises with critical evidence concealed on his person?" Put differently, is there any practical step officers can take other than what the

I.B.I. agents did in the instant case? The only light LaFave sheds on the subject is contained in a quotation from *United States* v. *Festa,* 192 F. Supp. 160 (D. Mass. 1960). The court there speculated that it might be permissible for an officer executing a warrant aimed at an easily-concealed type of property to order a person on the premises to remain until the officer can be certain that the detainee is not engaged in removing the property specified in the warrant. See also *State* v. *Wise,* 284 A.2d 292, 294 (Del. S. Ct. 1971). LaFave finds this to be a very persuasive suggestion, especially in light of this Court's subsequent decision in *Terry* v. *Ohio.*

The State of Illinois suggests that the mere ability to detain a person on the premises to interrogate him and investigate the possibility that he may be concealing narcotics mentioned in the warrant is hardly ever sufficient to create probable cause to either excuse the detainee or to search his person. Even if a fairly prolonged detention on the spot did not constitute an illegal arrest (which this Court's decisions have given every reason to believe it does), nevertheless, an officer's ability to question or investigate experienced traffickers in hard drugs, who have undoubtedly learned to be discreet about their activities, will haruly ever yield definite information to give probable cause for believing that specific drugs are concealed on an individual person. The suggestion in *United States* v. *Festa* being entirely impractical in narcotics cases, if a hard and fast probable cause rule is imposed on the search of persons not named in the warrant, there can be no resolution of Professor LaFave's question. Many of the circumstances in which he sees an essential right to search occupants of the place named in the warrant will then not be recognized in the law.

The facts of the present case are illustrative of the problem. The officers executing the instant search warrant for the Aurora Tap had information (already accepted by an impartial issuing judge) that tinfoil packets had frequently been seen behind the

bar and on the person of the bartender Greg by the informant, a patron of the tavern. (A. 3) The complaint stated that the bartender was going to be selling packets of heroin at the bar on March 1, 1976. (A. 3) Contained within the informant's affidavit was the undeniable inference that some patrons of the small tavern were the intended purchasers of the heroin sought in the warrant and, perhaps, were even dealers themselves. The patrons in the tavern while the warrant was being executed were most likely people who frequented the neighborhood establishment; they were connected with the tavern by their choice to be present in a place where possession and sale of narcotics were rather open and nortorious. (A. 2-3) The IBI agents clearly had a reasonable belief or suspicion that some or all of the patrons would have concealed on their persons some portion of the substances sought to be recovered in the warrant.[9] And yet under traditional probable cause standards, it might not be said that the police had probable cause to believe that any specific individual in the Aurora Tap was concealing heroin in tinfoil packets on his person, since no activity was observed by the police as they entered and no actions were taken by the patrons which would shed any light on their involvement during the initial minutes of the search warrant execution. If, contrary to the Illinois statute and the decisions of Illinois courts, the officers were unable to follow through on their reasonable belief that search objects were being concealed by some or all of the patrons and if they were not permitted to even pat down the patrons as part of the execution of the warrant, it is logical to expect that some or all of the patrons would have walked out of the tavern with some or all of the objects of the warrant in their possession. Nothing that the agents could have done, short of the greater intrusion of lengthy detention amounting to arrest or of detailed physical exam-

[9] The Return filed with this search warrant indicates that other patrons besides Ybarra were found to be concealing narcotics paraphernalia, i.e., hypodermic needles, and marijuana. (A. 7).

ination, would have informed them which of the patrons to search under a probable cause standard.

With no legal alternative for discovering objects of the search warrant concealed in patrons' clothing and given sanctuary there by a stiff probable cause standard independent of the warrant, the officers would undoubtedly have felt that their efforts and the warrant's purpose had been defeated to a great extent. The value of the search warrant would have seemed diminished, if not obliterated, in their eyes. As Chief Justice Weintraub said in the course of his decision in *State* v. *DeSimone, supra:*

> Needless to say there is no official arrogance when the officers place the facts before a magistrate for his view rather than search and seize upon their own assessment of the factual pattern when it accrued. Since it furthers the constitutional purpose to encourage applications to a magistrate [for a search warrant], we should take a view of the problem which will make that course feasible.
> 288 A. 2d at 851.

Unrealistic limitations on the execution of search warrants, if they endanger the officers' safety or obstruct and defeat the narcotics warrant's purpose, will definitely discourage applications to magistrates by drug enforcement officers for search warrants involving places where strangers may be found, which is to say, everyplace drugs are peddled.

D. Application of the Balancing Test Yields A Rule of Reasonableness Governing Personal Narcotics Searches Incident to Execution of Search Warrants:

To prevent such an unhappy turn of events and to encourage the use of judicially scrutinized and authorized search warrants for narcotics on premises where strangers will be found, this Court should employ the *Terry* balancing test to allow searches of persons on compact premises specified in the warrant, when there is information that drug trafficking is

taking place at that location and the police have a *reasonable belief* that the persons present are connected with the criminal activity and are likely to be concealing the objects of the warrant in their clothing.

Applying the analysis used by this Court to permit searches on less than traditional probable cause in *Terry* v. *Ohio,* 392 U.S. 1, *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), *United States* v. *Brignoni-Ponce,* 422 U.S. 873 (1975) and *Marshall* v. *Barlow's Inc.* 98 S. Ct. 1816 (1978), it is first noted that the governmental interests to be served by the ruling suggested are extremely strong. In line with the findings by Congress cited above in 21 U.S.C. § 801 and echoed in the enactments of every legislature in the nation, the Executive Branch of each government has an important interest in effectively controlling traffic in dangerous, hard drugs especially heroin. At the same time, the Judicial Branches of our governments have an interest in preserving the integrity and effectiveness of the search warrant, an interest which can be seen reflected in the many decisions over the past 20 years strengthening the warrant clause of the Fourth Amendment.

Balanced against these interests are the individual's concern with his privacy and his desire to avoid the indignities of personal searches. However, in the circumstance where an individual willingly enters a place where narcotics possession and/or sales is open and nortorious, there can be no realistic expectation that law enforcement authorities may not subject the individual to some inconvenience as a result of his choice. Appellee submits that only a minimal amount of inconvenience would result from the slight intrusion of a brief pat-down to discover forms in an individual's clothing which would give probable cause to believe he was carrying illicit drugs.

Clearly, the balance swings heavily toward the two governmental interests which would be served by a rule of reasonableness. Should the result required by balancing societal

interests here be different than it was in *Adams* v. *Williams*, 407 U.S. at 147, where this Court approved a quick search of a man sitting peacefully in his car at night based upon an informant's tip that the man was carrying narcotics and a pistol, information that may not have been sufficient for a search warrant? Should the result be different than it was in *United States* v. *Brignoni-Ponce*, 422 U.S. 873, where this Court approved limited investigative stops of unknown automobiles by roving border patrols in the border area, on reasonable suspicion that they might be carrying illegal aliens? Is it less reasonable in defining Fourth Amendment standards to accommodate the practicalities of government efforts to control the dangerous, debilitating narcotics traffic than to accommodate the realities of building code enforcement as did *Camara* v. *Municipal Court*, 387 U.S. 523?

Illinois submits that the twin governmental interests in the present situation are just as strong as those in the cited cases and that the inconvenience to or intrusion on bar patrons is no greater than the intrusions approved above. Therefore, the balancing test must yield the same result in the circumstances of the present narcotics search warrant case. A pat-down of patrons who are found on compact premises, are reasonably believed to have a connection with the premises or the criminal activity and are reasonably believed to have concealed in their clothes the objects of the narcotics search warrant should be allowed under the Fourth Amendment.

Ill. Rev. Stat., Ch. 38, § 108-9, as construed allows no broader searches of persons on premises which are being searched under warrant than is justified by the above balancing analysis. The statute was therefore constitutionally applied to

the facts of this case and Ybarra's conviction should be affirmed.[10]

[10] The same result can be reached in this appeal without removing the requirement of probable cause to search individual patrons on the premises, if the quantum of information and the degree of certainty required for probable cause in this situation is lessened, as in *Camara* v. *Municipal Court, supra.* Professor LaFave discusses the concept of a variable test for probable cause and presents approaches to that concept which could be used to find that the IBI agents in the present case *did* have probable cause to conduct a pat-down search of all patrons in the Aurora Tap for the objects specified in the search warrant. 1 LaFave, *Search and Seizure* (1978), § 3.2(a) and (e).

CONCLUSION

Whether this Court views the present appeal as one involving a frisk yielding probable cause to search for contraband or as a simple search incident to the execution of a narcotics warrant and pursuant to proper statutory authority, the search of appellant was proper under the Fourth Amendment. The statute attacked by appellant, if it had any effect on the outcome of his motion to suppress in light of *Terry* v. *Ohio,* was constitutionally applied by the court to the facts of his case. Appellant's conviction should be affirmed.

Respectfully submitted,

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BRIEF
APPENDIX A

BRIEF APPENDIX A

ASSAULTS ON DEA AGENTS

A Description and Analysis of Domestic Assault Incidents
(July, 1975 through December, 1976)

Prepared by:

Statistical and Data
Services Division
United States Dept. of Justice
Drug Enforcement Administration

INTRODUCTION

Purpose

This study was undertaken in an attempt to provide DEA management and Agent personnel with the most comprehensive data available regarding the conditions and circumstances surrounding assault incidents. The report's primary purpose is to provide descriptions and analyses of identified assaults which will prove beneficial in reducing both the risks involved and the number of assaults that occur during the course of investigative and related activity.

Sources

In order that all assaults would be accounted for, the scope of the data base employed for this report has been expanded over that of prior DEA assault studies. For this reason, no statistical comparisons or analyses of trends between this and preceding studies will be presented.

To insure total assault coverage, three sources have been utilized. The first of these is the "Discharge of Firearms" file maintained by the Office of Internal Security. This file contains accounts of all reported discharge of firearm incidents by Agents as well as several other assault incidents. The available listings were furnished to the appropriate Internal Security Field Offices and verified as accurate and complete. Second, the "Assaults on Agent" File maintained by the Investigative Records Section was searched. This file is a compilation of random assault incidents frequently unrelated to a specific investigation. Third, the Monthly Report of Assaults (DEA 346) submitted by each region was also utilized. Each individual region was then queried and asked to verify in writing regarding the actual number and corresponding case file listing of assault incidents reported on the DEA 346. It is believed that these sources encompass all domestic assaults occurring during the July 1, 1975—December 31, 1976 time

frame. Furthermore, to insure that the data contained in the above sources was not misleading, the corresponding case file in which an assault was identified was also studied.

Definition

As previously noted, the sources utilized provide an inclusive listing of assault incidents, ranging from assaults directly related to specific investigations to those related to various other aspects of enforcement activity. In an effort to provide a comprehensive insight into the nature of these occurrences, no identified assaults, with the exception of a limited number of incidents clearly beyond the scope of investigative activity, were omitted. Specific categories have been established to distinguish between the various types of assault situations.

With this in mind, a definition of what constituted an assault was formulated. Within the scope of this study, an assault is defined as the intentional or attempted use of physical force or weapon against a DEA Agent.[11] It should be noted, however, that in a number of situations a defendant injured or attempted to injure more than one Agent. For example, in one particular situation a defendant physically struck a State and Local Officer who was attempting to arrest him and then, moments later, struck another State and Local Officer. For purposes of this study, this is counted as one assault incident rather than two assaults.

* * *

[11] Unless otherwise specified, a DEA Agent also includes Task Force, other Federal and State and Local Officers.

I. STATISTICAL BREAKDOWNS

Total Assaults Over Time

A total of seventy-two domestic assault incidents occurred during the July 1, 1975, thru December 31, 1976, time frame. It is significant to note that of the seventy-two incidents, thirty-nine took place during the last six months of CY 1975 while only thirty-three occurred for all of CY 1976. If 2nd half CY figures are prorated to include the entire calendar year,[12] the resultant seventy-eight assaults would indicate a decrease of 58% in total assaults from CY 1975 to CY 1976.

* * *

Situation

By far, the most dangerous segment of an investigation is the arrest situation. Approximately 95% of all assaults occurred as an arrest was being made.[13] For purposes of this study, the arrest situation has been subdivided into two categories: (a) arrests in conjunction with a purchase of evidence and, (b) arrests in conjunction with the execution of warrants and similarly related circumstances. Both categories were equally divided (25 each) regarding the number of assault incidents.

Quite surprisingly, the number of robbery assaults during a purchase of evidence was extremely low (4). Furthermore, it should be noted that all four assaults occurred during the last six months of CY 75. No robbery assaults were recorded for the entire CY 1976.

[12] As previously mentioned, data base dissimilarities between this and prior DEA assault studies prohibit comparison of statistics.

[13] However, in the execution of warrants category of assaults almost half initially involved execution of search warrants or other searches, i.e. 10 or 12 of the 25 assault incidents studied. (This footnote added by the State of Illinois.)]

Assaults of all remaining classifications, with the possible exception of one category,[14] were minimal.

Situation (July 1, 1975-Dec 31, 1976	# of Assault Incidents
Arrest (execution of warrants and related circumstances)	25
Arrest (purchase of evidence)	25
Robbery (during purchase of evidence)	4
Surveillance	2
Compromise of Identity	2
Other (non-case related)	10
Other (case-related)	4
Total	72

Location of Assaults

Attempts to arrest defendants while they were seated in our behind the wheel of an auto precipitated the highest number of assault incidents. Invariably, in the majority of these cases, the defendant was attempting to escape and, in so doing, struck the officer with his vehicle.

Statistics reveal that assaults occurred in the following locations:

Automobile	— 27
Open Area	— 20
Private Residence	— 13
Other	— 10
Hotel/Motel	— 2
Total	72

Defendant Weapons

The firearm was the weapon used in nearly 38% of all assault incidents. Physical attacks and assaults involving the use of automobiles ranked second with identical numbers of assault incidents, eighteen each. A fourth category identifies

[14] See Section VII, (other non-case related assaults).

four incidents in which an unarmed defendant struggled for possession of the Agent's service revolver.

Weapon	# of Assault Incidents
Firearm	27a
Auto	18
Physical Attack	18
Struggle for Agent's Service Revolver	4
Knife	2
Other	3b
Total	72

a. One incident involved the use of both a firearm and knife.

b. Other weapons: (1) chemical substance; (2) bottle; (3) attache case.

* * *

Primary Drugs Removed

Of the fifty-eight assault incidents directly related to an ongoing investigation, heroin or cocaine was the primary drug removed or negotiated for in thirty-nine or 67% of the investigations. Although a review was initiated, no determination could be made as to whether or not drug type was a contributing factor in the assaults studied.

Primary Drug Removed/Negotiated	# of Cases	%
Heroin	21	36%
Cocaine	18	31%
Marihuana	5	9%
PCP	4	6%
Amphetamine	3	5%
LSD	3	5%
Methaqualone	1	2%
Quaaludes	1	2%
Methamphetamine	1	2%
Hashish	1	2%
Total	58	100%

II. ARRESTS (EXECUTION OF WARRANTS AND RELATED CIRCUMSTANCES)

Description

Location of Assault

Thirty-five percent of all assaults occurred as Agents were executing arrest/search warrants or engaged in similarly related circumstances. Of these, ~~eig~~hteen of the twenty-five assault attempts took place in either a private residence or automobile. A breakdown of the location of assaults is as follows:

Location	# of assaults	Percent
Private Residence	10	40%
Automobile	8	32%
Open Area	3	12%
Other	4	16%
Total	25	100%

Type of Assault

A strong correlation exists between the location of the assault attempt and the weapon utilized. Of the ten assaults occurring in a private residence, a firearm was the primary weapon employed in six incidents while, in two other occurrences, unarmed defendants struggled for possession of the Agents' service revolver. In each of the eight attempts to arrest a defendant in an auto, the auto itself was the instrument utilized as a weapon. As previously mentioned, the defendants were invariably attempting to escape and, in so doing, struck the officers with their vehicles. It should be noted that in four incidents the arresting officers did not set out to arrest a defendant while he was in his auto but, due to extenuating circumstances, were forced to deviate from the planned arrest situation. Of the seven assaults occurring in an open area and other locations,[15] only one incident involved the use of a firearm. The remaining six were physical attacks only.

* * *

[15] Other location includes: airport terminal, airport first aid room, airport restroom, carport.

APPENDIX OF CASES

Private Residence

1. An informant was to be utilized in an attempt to gain entry into an apartment and apprehend a defendant without violence. The informant accompanied by two SA's arrived and was admitted into the apartment. After entry, the defendant inquired as to the identities of the SA's. Before the informant could respond, the defendant stood and aimed a pistol at the SA's, ordering them and the informant to place their hands on their heads and remain motionless. Another person then blocked the door and was instructed by defendant to search everyone. This individual stepped toward the SA's and, in so doing, left the door unguarded. Both SA's, while talking in an attempt to pacify the defendant, inched toward door. The defendant observed this movement and cocked the pistol. Both SA's continued talking and managed to open the door and back out of the apartment. The door was then locked from the inside. Surveillance was contacted and instructed to assist. Both SA's knocked again and identified themselves. The defendant refused entry and advised he was going to dial 911. Both SA's encouraged him to do so. The defendant eventually unlocked the door and surveillance entered the apartment. The defendant ran into the kitchen and struggled violently before he was subdued and arrested. One SA sustained neck and knee injuries.

2. Five SA's arrived at a basement apartment to effect the arrest of a defendant. An SA knocked on the door which was opened by another person. The SA identified himself at which time this individual attempted to close the door and began yelling to alert person(s) within. The SA pulled the door open and ran to the rear of the apartment. Another SA attempted to push the subject aside to allow entrance of the other officers. The subject struggled with the SA and grabbed his service revolver, partially cocking the hammer. The other SA's then assisted in subduing and arresting the subject. Defendant was also arrested without further incident. No injuries.

3. Three SA's arrived at a residence to execute the arrest warrant. Two SA's approached the front door while one covered the rear. The defendant came to the front window at which time both SA's identified themselves and stated they wished to talk. After waiting approximately three minutes, the defendant invited one SA, whom he had previously negotiated with, inside. The door was shut on the other SA with defendant advising him to remain outside. Inside the residence, the SA displayed the arrest warrant. Defendant then turned and pushed the SA away. The SA drew his service revolver and advised the defendant to remain motionless. The defendant ran to the hallway and picked up a shotgun. The SA grabbed the barrel of the shotgun and began wrestling with the defendant. Both SA's then entered and assisted in subduing and arresting the defendant. No injuries.

4. As an individual entered the front doorway of the residence, both SA's identified themselves and attempted to question him concerning the location of defendant. The individual then attempted to push both SA's out the doorway. The SA's explained they only wished to question him concerning the whereabouts of defendant. The subject became more abusive and proceeded to shove and punch one of the SA's. The subject was then subdued and placed under arrest. Defendant, who was in the basement at time of the assault incident, was later arrested by surveillance. No injuries.

5. Prior intelligence indicated that a certain residence was being utilized as a storage house for heroin distribution. An SA arrived and knocked on the front door of the residence. (SA was accompanied by seven enforcement officers who concealed themselves from view). The defendant responded but denied knowing the SA, announcing the door would not be opened unless it was the police with a search warrant. The SA then identified himself, stated that he was in possession of a search warrant and requested that the defendant open the door. No reply was received. The SA again announced his presence and purpose. No reply was received, therefore, forced entry was initiated. At this time, the defendant raised the second floor window and fired one shot from a revolver. Two SA's then returned a total of ten shots at the window area. When firing ceased, a

State and Local officer observed movement at the front window area and, in an attempt to gain control of the downstairs area, thrust his gun through the window, discharging one round into the ceiling. At this time, the SA again ordered the defendant to open the door and lay on the floor. The defendant complied and was placed under arrest. No injuries.

6. Six SA's and one A.T.F. Agent, in possession of a Federal warrant, arrived at the defendant's apartment, knocked on the front door and announced their office and purpose. When no response was received, entry was forced. After entering, one SA shouted, "Federal Agents with a search warrant". As the SA proceeded down the hallway, he again announced his office and purpose. Arriving at the bedroom, the SA once again announced his office and proceeded to kick the bedroom door open. At this time he observed the defendant sitting up in a corner of the room with a gun aimed at the bedroom door. The SA then stepped back out of the doorway and ordered the defendant to drop the gun. Looking back into the room, he noticed that the defendant still had the gun pointed at the door. The SA then fired one round from the shotgun before stepping back from the door. The SA again ordered the defendant to drop his gun. Looking back into the room, he noticed that the defendant's hands and head were now concealed by a blanket. Believing that he was still in danger the SA fired one more round from the shotgun. Defendant then surrendered. Defendant sustained fatal gunshot wounds.

7. In possession of a Federal warrant, four SA's and three U.S. Marshalls surrounded the defendant's house, covering all exits. Two SA's and one U.S. Marshall knocked on the front door and identified themselves to the defendant who retreated to the second floor landing after refusing entry. The SA attempted entry but to no avail. Shortly thereafter, the defendant reappeared and fired two successive shots from a pistol. After returning fire, the officers again identified themselves, ordering defendant to surrender. After receiving assurance that no harm would come, the defendant threw his pistol down the stairs and surrendered. One SA received treatment for removal of glass in his left eye.

8. Two SA's and one State and Local officer arrived at the entrance of a trailer home. An SA announced on two separate occasions that he was a Federal Agent with a search warrant. When no reply was received, the State and Local officer kicked the front door open and was immediately confronted by the defendant with drawn automatic pistol. The State and Local officer ordered the defendant to drop his weapon. The defendant refused, further cocking the hammer of his pistol. The State and Local officer, believing that the defendant was about to shoot him, fired twice in succession, both rounds striking the defendant with fatal results.

9. In possession of a state search warrant, one SA and four State and Local officers knocked on an apartment door and announced their authority. Sounds emanated from the rear of the apartment suggesting that drugs were being destroyed. The SA used forced entry and proceeded to the bathroom where he observed the defendant flushing the toilet. The SA identified himself and ordered the defendant away from the toilet. The defendant was then removed to another part of the bathroom. Noticing that the toilet was filled with foil packages, the SA reached in and removed several packages. The defendant then struck him several times in the rib cage, knocking him against the wall. The SA stood up and pushed the defendant into a corner. The attacks occurred twice more. After the third attack, the SA struck the defendant once on the head with his pistol to eliminate the possibility of being hit again. No injuries.

10. In possession of an arrest warrant, two SA's entered an apartment to arrest one defendant (a total of five persons were in apartment during the arrest situation). Five SA's and four State and Local officers remained outside on surveillance. The SA's displayed their identification and arrest warrant to the defendant. At that point, two surveillance SA's gained entrance through the rear of the residence and started toward the basement area. All the occupants, including the defendant, then ran to the basement followed by surveillance officers. In the basement area, the occupants struggled with both SA's and attempted to gain possession of their service revolvers. Calm was eventually restored and the subjects were placed under arrest. No injuries.

Automobile

1. In the process of executing a state search warrant, three Task Force officers (one in full uniform) and two SA's arrived at residence. Shortly afterwards, a vehicle with three defendants inside pulled into driveway. Upon noticing the officers, defendants began to back out. The three Task Force officers approached, identified themselves and ordered vehicle to stop. Vehicle continued backing up at a high rate of speed. Upon reaching the street, vehicle began moving forward. Two of the Task Force officers took position in street directly in front of the vehicle. The vehicle travelled directly toward one officer knocking him to ground. He then fired his weapon in an attempt to halt the vehicle. Vehicle then proceeded forward toward the other officer, knocking him to the ground. He also fired at the vehicle. The third Task Force officer, thinking that both officers had been shot, then opened fire. Two additional officers, one SA and one ATF Agent, who at the time were approaching the residence to be searched, were informed of the fleeing vehicle and gave chase. All defendants were arrested without further incident. Both Task Force officers sustained minor injuries.

2. Subsequent to halting the defendant's vehicle, two SA's exited the OGV and approached both sides of the defendant's auto. SA approaching driver's side held service revolver in his left hand and badge in his right hand, both visible to the defendant, and announced his intent. Defendant then accelerated hard left and forward striking the SA causing his service revolver to accidentally discharge. Both SA's returned to the OGV, and along with two SA's in another OGV, gave chase. SA then observed defendant's vehicle suddenly come to a halt. One OGV was driven in front of and the other to the left of the defendant's auto. All SA's exited and approached the defendant who was then taken into custody. Defendant sustained gunshot wound as a result of the accidental discharge.

3. Prior information indicated that two defendants were involved in the trafficking of large quantities of heroin. Mobile surveillance was maintained on the defendant's vehicle until the order was given to effect their arrest. At this time, two OGV's pulled up to the front and rear of defendants' vehicle. Two SA's exited, identified themselves and advised both defendants they were under arrest. As SA opened passenger door, defendant placed the vehicle in gear. SA ran to front of vehicle, identified himself again and ordered vehicle to stop. Defendant drove toward both SA's who jumped back to avoid being struck. Vehicle proceeded past SA's and down an embankment into a wooded area, crashing into a tree stump. Defendant then ran into woods with SA in pursuit. SA again identified himself and advised defendant to exit the woods. A short time later, defendant returned and was advised that he was under arrest for assault. SA, noticing that defendant was unarmed, placed his service revolver in waistband. As he did so, defendant again attempted to flee but was tackled in the process. A brief struggle ensued, after which the arrest was effected. Other defendant was arrested without incident. No injuries.

4. After execution of search warrant, two SA's remained in the area in an attempt to apprehend defendant upon his arrival home. Defendant accompanied by another individual later drove past the residence. Both SA's followed until defendant exited his vehicle. SA's then identified themselves at which time defendant returned to auto and sped away, striking one SA with the vehicle. SA's returned to OGV and gave chase. After searching the area with negative results, SA's returned to defendant's residence advising subject's mother of his escape. After several phone calls, she contacted and persuaded her son to return home. Subject later arrived and surrendered. No injuries.

5. Information indicated that defendant would be delivering a quantity of heroin via auto. A decision was reached to effect the arrest at a designated intersection. Upon arrival of defendant, OGV's pulled up to the front, rear and right side of defendant's vehicle (all OGV's utilized flashing beacons). SA ran to passenger door, identified himself, ordering defendant to freeze. SA, noticing that defendant had moved his hands toward wheel and gear shift, attempted to open passenger door with negative results. Defendant placed vehicle in reverse and backed into one OGV. Defendant then accelerated toward one SA. At this time, SA, who was attempting passenger door entry, discharged three rounds into the rear of defendant's vehicle. Defendant fled, pursued by five OGV's. Defendant later

lost control of vehicle, which spun out next to a junkyard. Upon arrival, the SA's observed defendant's vehicle stopped with driver's door open. A search was initiated with defendant found hiding under an abandoned auto. He was then placed under arrest. No injuries.

6. after observing one of two defendants placing suitcases in trunk of auto, surveillance SA's approached. Noticing the arrival of both OGV's, defendant entered auto and attempted to depart. Both OGV's blocked exit at which time defendant attempted to go between the OGV's. Failing, he backed up. As surveillance officers approached on foot, defendant accelerated toward one officer. With weapons drawn, surveillance ordered defendant to stop. He complied only after one SA had fallen across hood to avoid being run over. Other defendant was arrested without further incident.

7. After receiving information that defendant was soliciting funds for purchase of marihuana and amphetamines, one SA and one Task Force officer proceeded to parking lot to await defendant's arrival. Upon his arrival, OGV was driven in front of defendant's vehicle and both officers exited. Task Force officer approached driver's side with ID in hand. Defendant accelerated causing Task Force officer to jump back. Both officers pursued. Defendant attempted to ram OGV three or four times during chase. After another near collision, Task Force officer fired one round into right side of vehicle bringing it to a stop. Defendant was then arrested. No injuries.

8. Two teams of SA's assumed surveillance in a field adjacent to a river. SA's were concealed between and under various abandoned vehicles. Intent was to apprehend two defendants, one of whom was a swimmer expected to exit river with six kilograms of cocaine. Defendant, to whom cocaine was to be delivered, entered field and parked at the foot of the river. Shortly after movements were observed in the water, defendant started his car and proceeded toward vehicle occupied by informant and undercover SA. After parking, defendant exited and stood next to informant's vehicle. At this time, two SA's identified themselves in both Spanish and English and shouted for defendant to freeze. Defendant ran to his vehicle, entered the driver's side and was observed to be reaching under the front seat while,

at the same time, accelerating vehicle in the direction of one SA who was approaching from the front. Believing that defendant was reaching for a weapon and about to run over SA, the arresting SA's opened fire. Defendant escaped immediate area but was pursued and arrested by surveillance without further incident. At the time of arrest, a pistol was seized from the purse of defendant's companion. No injuries. It should be noted that due to radio malfunction, contact between surveillance teams and observation post was lost.

Open Area

1. Information was received from a wholesaler indicating that a half shipment of quaaludes would be diverted. After meeting with company officials, SA's substituted a package containing 100 quaaludes from the original 9,600 shipment. Three defendants were initially arrested and agreed to cooperate. Plans were then formulated to effect the arrest of the final two defendants, As arranged, an undercover SA and informant inside CI's vehicle followed the two defendants to a designated location. (Substitute package was located in trunk of CI's vehicle). Both defendants exited their vehicles and proceeded to informant's vehicle. The informant then exited his vehicle as planned. All three individuals engaged in conversation near the rear of CI's vehicle. After a few minutes, trunk of CI's vehicle was lifted (arrest signal) but was quickly lowered as a surveillance vehicle approached. A short time later, trunk was lifted again. Undercover SA and surveillance officers then exited their vehicles. After identifying himself, undercover SA attempted to arrest one defendant, who resisted and tried to escape. SA, while struggling with defendant on the ground, was struck in the face. After defendant was subdued, a search revealed a loaded gun. Other defendant was arrested without a struggle. No injuries.

2. Three SA's observed two defendants standing on street corner. Defendants were to be arrested in connection with cocaine delivery. The SA's approached and announced their office. One defendant was then placed under arrest. At that time, the other defendant made a remark about law enforcement officials. SA then turned toward this individual and was physically struck by him. Subject was then subdued with necessary force and placed under arrest. No injuries.

3. In possession of an arrest warrant, two SA's observed the defendant enter a vehicle on the passenger side. The OGV was then driven in front of defendant's vehicle. Both SA's exited, identified themselves and ordered defendant to step out and place his hands on the roof of the vehicle. After ignoring at least three repeated demands, the defendant finally exited and, with gun in hand, moved in a crouched position to the rear of the vehicle. Both SA's approached and, as one SA neared the rear of the vehicle, the defendant aimed his gun at him. (Subsequent investigation indicated that defendant's weapon misfired due to faulty ammunition). The SA responded by firing three shots at defendant. Stepping to the rear of the vehicle, the SA observed the defendant crouching with the pistol in hand facing the other SA. The SA then fired a fourth shot, wounding the defendant. The defendant began struggling at which time the SA struck him on the head with his pistol which discharged. Both SA's then subdued the defendant.

Airport Terminal

1. During inspection of arriving flights, two SA's approached a defendant, identified themselves and requested defendant's identification. SA's then asked defendant to accompany them to another location for further questioning. At this time, defendant struck both SA's in chest with forearm and clenched fist. Pursued by four SA's, defendant exited passenger tunnel and entered parking lot. During chase, SA's observed defendant place his hand in jacket pocket. Thinking that defendant was attempting to draw a weapon, two SA's withdrew their service revolvers and commanded him to stop. Defendant turned and yelled "don't shoot". He then removed the heroin from his pocket and tossed it over the Fence. Defendant was arrested without further incident. No injuries.

Airport First Aid Room

1. Two SA's, on routine inspection of arriving flights, identified themselves to defendant and asked him to accompany them to first aid room. After entering, defendant attempted to flush the heroin down the sink. A brief struggle ensued. Defendant was then subdued and placed under arrest. No injuries.

Airport Restroom

1. SA, on inspection of arriving flights, followed defendant to airport terminal entrance. SA identified himself and asked defendant to accompany him to airport restroom. After entering, defendant ran to restroom stall and attempted to flush heroin packet down the toilet. SA followed and removed packet. After struggling, SA then forcibly removed defendant from restroom. No injuries.

Carport

1. In possession of a search warrant, two teams of Task Force officers approached the front and rear of a private residence. Other officers remained in the immediate vicinity. After observing four defendants inside a pickup truck parked in the carport of the residence, two Task Force officers approached, identified themselves and ordered the defendants to exit the vehicle. After exiting, one defendant physically struck one of the officers on the jaw. The officer retaliated by striking the defendant in the mouth. During the incident, another defendant attempted to assault the officer but was restrained by a third Task Force officer who had entered the carport. Two additional Task Force officers then approached the carport and, after seeing that the situation was under control, proceeded to secure the residence. Returning to the carport, one of the officers approached the defendant, who had assaulted the arresting officer, identified himself and stated that he was in possession of a search warrant. The defendant then struck the officer with his fist. A struggle ensued between the defendants and the arresting officers. All defendants were eventually handcuffed and arrested. One Task Force officer was hospitalized and treated for a fractured nose, eye and lip bruises.

BRIEF
APPENDIX B

BRIEF APPENDIX B

DRUG AGENTS GUIDE

TO

SEARCH & SEIZURE

Written by

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Office of Chief Counsel
Drug Enforcement Administration
U.S. Department of Justice

1978

WARNING

The rules contained in this Guide are based upon the Fourth Amendment to the United States Constitution, as interpreted by the Supreme Court and by a majority of lower federal courts. A few of the rules have been interpreted or applied differently by a number of lower courts, both state and federal. Moreover, many states impose tougher restrictions on police conduct than the federal Constitution does. It is imperative, therefore, that you

CONSULT YOUR PROSECUTOR OR LEGAL ADVISOR BEFORE APPLYING THE RULES CONTAINED IN THIS GUIDE! [(ii)]

DRUG AGENTS GUIDE TO SEARCH & SEIZURE

by Harry L. Myers
Office of Chief Counsel
Drug Enforcement Administration

I. Introduction

It is extremely difficult today to obtain a good working knowledge of search and seizure law. First, the sheer number of cases being decided on the subject makes it impractical to stay current with every small change or interpretation handed down by the courts. The volume of cases decided, almost on a daily basis, is overwhelming. Second, many of the reported decisions conflict with one another. Trying to extract rules from these decisions, which can be confidently applied in future investigations, is always frustrating and frequently impossible. Third, there are countless factual situations involving Fourth Amendment protections which have never been resolved by the courts. How can an agent be expected to cope with so many unknowns? Finally, assuming the conflicting decisions could be resolved and a rule could be found for every case, how could a law enforcement officer learn such a large body of law?

In spite of these hurdles, drug enforcement officers must develop a practical knowledge of search and seizure law. Without it, they run the risk of violating constitutional rights, they jeopardize the successful prosecution of their cases, and they expose themselves to civil lawsuits for damages.

The solution to this dilemma—the absolute need to learn the law, on the one hand, and the many hurdles to learning, on the other—lies in a two step approach: [-6-]

(i) LEARNING THE CLEAR-CUT RULES, and

(ii) DEVELOPING A LOGICAL SYSTEM TO APPLY THE RULES TO ANY PROBLEM. [-7-]

A knowledge of the basic rules is essential. These core principles are applicable to every case, they remain unchanged for long periods of time, and they are recognized and accepted by virtually every court. Learning these clear-cut rules is the first step to learning the law.

Developing a thorough, systematic approach for applying these rules to most factual situations is equally essential. Analyzing a problem, identifying the legal questions, and selecting the correct legal rules, should not be a "hit or miss" proposition. A logical approach is needed: one that insures a more thorough analysis, prevents jumping to "gut" conclusions, and makes complex situations easier to solve by breaking them down into smaller, simpler, problems. Cromberg, et al., *On Solving Legal Problems,* 27 Journal of Legal Education 165 (1975).

These two steps offer the best way to develop a working knowledge of search and seizure law in the least amount of time. An officer cannot memorize the rule of law for every possible case he will encounter. Learning the basic rules and knowing how to apply them offers a way to cope with the endless variations that must be faced. [-7-]

* * *

4. Search Can't Exceed Warrant's Scope

A search warrant restricts the search to only those places, and for only those objects, described in the warrant. The search cannot exceed this scope.

a. *Areas to be Searched* [-78-]

* * *

3) *Persons on Premises*

A search warrant for premises does not automatically authorize a *full* search of persons either found on the premises or who come onto the premises while the search is in progress (*U.S.* v. *Di Re.* 68 S.Ct. 222, 1948; *U.S.* v. *Festa,* 192 F. Supp.

160, DC Mass. 1960; *Smith* v. *State,* 289 So 2d 816, Ala. 1974; *State* v. *Bradbury,* 243 A.2d 302, N.H. 1968; *State* v. *Carufel,* 263 A.2d 686, R.I. 1970; *State* v. *Fox,* 168 N.W. 2d 260, Minn. 1969; *State* v. *Massie,* 120 S.E. 514, W.Va. 1923; *People* v. *Smith,* 234 N.E. 2d 460, N.Y. 1967; *Purkay* v. *Maby,* 193 P. 79, Idaho, 1920).

If, on the other hand, the persons on the premises or coming onto the premises are connected to the illegal activity, and could be concealing objects named in the warrant, they can be searched for those objects (See *U.S.* v. *Peep,* 490 F.2d 903, 8 Cir. 1974; *U.S.* v. *Micheli,* 487 F.2d 429, 1 Cir. 1973; *U.S.* v. *Johnson,* 475 F.2d 977, DC Cir. 1973).

It is not clear whether you need probable cause or simply a reasonable suspicion to believe persons on premises are concealing items named in the warrant, but you must be able to articulate some facts which make it likely.

Example. You have probable cause to believe Charlie is distributing drugs to a steady stream of buyers visiting his house trailer. You get a valid warrant to search the trailer and Charlie for drugs. While executing the warrant you find marihuana, scales, plastic baggies, rolled marihuana cigarettes, methamphetamines and other drug paraphernalia. [-79-]

The phone rings. You answer it. A man asks for Charlie. You say "He's busy, but come on over." Within a few minutes a man knocks and you let him in. He is carrying a brown paper bag. Does the warrant permit you to conduct a full search of this visitor?

Yes. Although a search warrant for premises does not automatically extend to persons on the premises, you have sufficient facts and circumstances to believe the visitor is there either to buy from or to supply Charlie with drugs, and that he may be concealing items named in the warrant. Therefore, he can be searched (See *Earnest* v. *State,* 314 So. 2d 796, Fla App. 1975).

Example. You have probable cause to believe that Milt is involved in drug trafficking and that he stores large quantities of heroin at his barber shop. You have no indication that Milt is selling to shop customers. You obtain a warrant to search Milt and his shop. You execute the warrant at noon on a business day. While you are searching, a clean-cut male, dressed in a three-piece suit comes to the shop and you let him in. One of the barbers tells him the shop is closed and to come back tomorrow. You know nothing about the man. May you subject him to a full search under the warrant? [-80-]

No. There is no evidence that the shop is retailing drugs to a steady stream of customers. You have no information to link the visitor to criminal activity. The man is likely to be an innocent customer who knows nothing of Milt's activities. Therefore, the warrant to search the shop does not extend to him (See *Smith* v. *State,* 227 S.E. 2d 911 Ga. App. 1976; *Smith* v. *State,* 289 S.2d 816, Ala. 1974; *U.S.* v. *Branch,* 545 F.2d 177, DC Cir. 1976). [-81-]

* * *

5. Protective Measures

A search warrant is an order issued by a judicial officer in the name of the government, commanding an officer to conduct a search for specified objects.

Persons do not have the right to forcibly resist the execution of a search warrant, even though the warrant may later be held to be invalid (*U.S.* v. *Ferrone,* 438 F.2d 381, 3 Cir. cert. den., 91 S.Ct. 2188, 1971).

a. **Anything Necessary and Proper.** Subject to department restrictions (for example, restrictions on the offensive use of firearms) and to restrictions imposed by statute, you may do whatever is necessary and proper under the circumstances to execute the warrant (*Clifton* v. *Cox,* 549 F.2d 722, 9 Cir. 1977).

b. **Securing Persons.** You can restrict the movement of persons on the premises both to protect yourself and to prevent interference (*U.S.* v. *McKethan,* 247 F. Supp. 324, D.DC. 1965) [-83-]

You *may* be justified in frisking persons found on the premises for your protection while executing the search. See the "Stop & Frisk" section of this outline for a discussion of the right to frisk.

Remember: Your right to secure the persons found on the premises does not automatically include the right to conduct a *full* search of their person.

c. **Securing Weapons.** You have the right to locate and take temporary possession of any weapons in the area which you reasonably believe could be used against you (*U.S.* v. *Chapman,* 549 F.2d 1075, 6 Cir. 1977; *U.S.* v. *Bowdach,* 414 F. Supp. 1346, SD Fla. 1976; *U.S.* v. *Gilbert,* 378 F.Supp. 82, WD So. Dak. 1974; *U.S.* v. *James,* 408 F. Supp. 527, SD Miss. 1973).

Of course, once the search is over and the danger has passed, continued possession of the weapon cannot be justified as a safety measure. Unless some other justification exists for retaining the weapon it must be returned to the owner (See the "Plain View" section of this outline). [-84-]

* * *

BRIEF
APPENDIX C

BRIEF APPENDIX C

THE PEOPLE OF THE STATE OF ILLINOIS, ***Plaintiff-Appellee,*** **vs.** **GLORIA MILLER,** ***Defendant-Appellant.***	Appeal From The Circuit Court of Cook County. — Honorable **WARREN D. WOLFSON,** Judge Presiding.

Mr. JUSTICE O'CONNOR delivered the opinion of the court:

Defendant, Gloria Miller, was indicted on two counts of possession of a controlled substance. After a bench trial, defendant was found guilty as charged. The circuit court of Cook County sentenced her to concurrent terms of imprisonment of 4 to 6 years on count one and 1 to 3 years, plus a $1,000 fine, on count two. Defendant appeals the judgments of conviction, contending only that the trial court erred in denying her motion to quash her arrest and suppress physical evidence.

Officer Cleophus Johnson was called as a witness on the motion to suppress. Johnson testified that on April 25, 1975, at about 12:45 a.m., his partner, Officer Nathan Gibson, eight to ten other officers and himself had occasion to execute a search warrant. The warrant stated that there was probable cause to believe that a quantity of heroin was located upon the person of Carolyn Harris and in her third floor apartment in Chicago. The officers were in plain clothes and forced their way through the front door by using crowbars and sledge hammers. They searched the apartment for about one to one and one-half hours, discovering a quantity of narcotics and three handguns. As a result, James and Carolyn Harris were arrested for possession of narcotics.

According to Johnson, about an hour and one-half after the officers' entry, while they were concluding their search in the living room, he heard a knock at the rear door. When he first saw the defendant, she and a male companion (Earl Charles) had entered through the back door and were walking to the living room. Johnson testified that he did not draw his gun and did not see Gibson's weapon drawn. Nor did the officers order defendant or her companion to enter the apartment.

Johnson further testified that the officers asked Charles who he was, why he was there and whether he lived there. His response, if any, is not of record. Approximately two to three minutes after defendant and Charles entered the apartment, the officers searched Charles and recovered a weapon. Johnson testified that at the time of this search defendant was not free to leave. A few minutes later Johnson noticed a large bulge in defendant's pants. Upon questioning, defendant replied that it was a sanitary napkin. Officer Johnson told her, "it wouldn't stick out like that" and said she would have to be handcuffed until she was searched by a police matron. According to Johnson, Charles whispered to defendant that she "might as well give it to him." At this point defendant proceeded to the bathroom accompanied by the officers. She unzipped her pants and removed two clear plastic bags containing a brown narcotic powder. Defendant was arrested and transported to the police station, where she produced more narcotics from her bra.

On cross-examination, Johnson testified that the rear door of the apartment leads to an enclosed porch. The majority of the officers involved in the search had already left the premises when defendant arrived. He indicated that the bulge in defendant's pants was pointed and could have been another weapon. When defendant was walking to the bathroom, Johnson remained close behind her.

On redirect-examination, Johnson explained that when defendant and Charles knocked on the door, the officers had already searched every room in the apartment, but were making a final search of the living room. Officer Johnson also testified concerning his safety:

"Q You said when you saw the bulge you believed in your mind that it was a weapon, is that correct?

"A Yes.

"Q You didn't have a weapon drawn?

"A No.

"Q Therefore, Officer, were you in fear for your safety at this point?

"A Not at this point.

* * *

"Q At anytime that evening before she gave you some objects from her pants were you in fear of your safety because you thought she had a weapon in her pants?

"A No.

* * *

"Q When did you feel that your safety was in danger?

"A If I turned my back she would have a chance to go in her pants, but as long as I was facing her, I didn't feel—

* * *

"Q Did you ever turn your back on Gloria Miller?

"A No."

Defendant was not handcuffed until she was arrested. On recross-examination, Johnson explained that if defendant made a move, he could keep physical control.

Johnson's partner, Officer Nathan Gibson, also testified at the suppression hearing. Gibson stated that at about 2 a.m., he and Johnson first encountered defendant and Charles in the kitchen. He observed that the door between the kitchen and the enclosed porch was open. There was a wooden door from the porch to the outside which had a lock.

Gibson was the first officer to confront defendant and he had his weapon drawn. He testified that Johnson was behind him and did not have his weapon drawn. Gibson informed the couple that a "flash raid" was being conducted. Charles said he had come to see Carolyn Harris. According to Gibson, he did not point his weapon at the couple and neither officer directed them to enter the apartment. The officers frisked Charles and recovered the handgun. Gibson subsequently noticed a large bulge shaped like a half moon in the crotch of defendant's pants. When Gibson questioned defendant about the bulge, she said it was contraband. Charles told her to give the contraband to the officers. She surrendered the contraband, was arrested and advised of her rights. At the station she informed the police she had more contraband in her bra.

Defendant did not make any movements or gestures to indicate to the officer that he had reason to fear for his safety. Nonetheless, Gibson was cautious because of the handguns previously recovered and because defendant had not been searched. He did not turn his back on defendant. Gibson also stated that from the moment defendant entered the apartment she was not free to leave.

Officer Gibson further testified as to his frame of mind upon encountering defendant and Charles:

> "* * * [W]e were conducting this raid, and when I met Gloria Miller and Earl Charles in the kitchen in the area, I did not know why they were there. And when they informed me they wanted to see Carolyn Harris, whom we had a search warrant for, and her premises, I felt that it was necessary to conduct a protective search of the male."

Gibson stated that it was his intention to conduct an investigatory "field interview" of the couple upon their entry.

James Harris testified for the defendant that on April 25, 1975, he lived with his wife and two small children in the third floor apartment named in the warrant. He had gone to bed at about 4 p.m. and was awakened between 9 and 10 p.m. by policemen breaking down the front door. The police conducted a search of the apartment and ultimately arrested James and Carolyn Harris.

According to Harris, between 3 and 3:30 a.m. he was sitting handcuffed in the living room with his wife, two children, and Officers Kelly, Johnson and Gibson. They were waiting for Carolyn Harris' mother to arrive to pick up the children before being transported to jail. All the other officers had left the premises; the search had been completed 30 to 45 minutes previously and the officers were listening to his stereo.

At this time and under these circumstances, there was a knock at the back door of the apartment. Harris testified that this door led outside of the apartment and was padlocked and secured from the inside by an iron bar, commonly called a police lock. Inside this door was an enclosed porch. French doors separated the porch from the kitchen. Harris further testified that Officers Johnson and Gibson went to answer the door. It took them two to three minutes to operate the police lock and open the door. Both officers were in the enclosed porch area. Gibson opened the door, directed defendant and Charles inside with a waving motion of his left hand, and with his right hand pointed his service revolver out the door.

The trial court considered all of the above evidence and made certain findings of fact. Initially, the court found that:

> "* * * [T]o place the testimony of Officer Gibson alongside the testimony of Officer Johnson, the only reasonable conclusion would be that they are not credible

witnesses, that the contradictions in their testimony, I think, are unexplainable. I won't go down the entire list of them."

The court found Harris' testimony credible and accepted it for the purpose of its opinion.

After resolving credibility, the trial court stated additional findings which follow in pertinent part:

"There was a knock on the door in the early morning hours of April 25th of 1975. The police were on the premises, had conducted a search pursuant to a lawful warrant, * * *.

"I find the police invited, and I use the term invited in much the same way the Court use [sic] directed in Pugh, invited Gloria Miller and Earl Charles, her companion, into the premises; one officer having his gun drawn at least. And I find further that it was not a voluntary entry onto the premises.

"I further find that the police were on the premises for a proper purpose, that they had at that point already found contraband during a lawful search and were in the process of * * * taking the Harrises into custody.

"I find that while the search itself had been completed, the police were still in the place where they had a right to be and that they were waiting for somebody in the family to arrive to care for the children of Mr. and Mrs. Harris.

"I further find that three handguns had been found in the apartment before Gloria Miller entered the premises."

Under these facts, the trial court ruled that Ill. Rev. Stat. 1975, ch. 38, par. 108-9, and *People* v. *Pugh* (1966), 69 Ill. App. 2d 312, 217 N.E.2d 557, enabled the officers to legally require defendant and Charles to enter the premises. Moreover, the court believed the officers had a right to frisk them for weapons.

The sole issue on appeal is whether, pursuant to Ill. Rev. Stat. 1975, ch. 38, par. 108-9 and decisional law, the police may order a citizen not on the premises nor named in the search warrant to enter and subject themselves to a search.

For purposes of this opinion we accept, in substance, the trial court's findings of fact. However, we find the officers had no legal right to force defendant onto the premises and search her. Accordingly, we reverse and remand.

Preliminary to determining whether the search was valid, the State does not contend that defendant acted voluntarily in turning over the contraband stored in her pants. Thus, they have conceded that presenting defendant with the choice of cooperation or handcuffing and subsequent search by a police matron constituted a search under the fourth amendment. (U.S. Const., amend. IV.)

Ill. Rev. Stat. 1975, ch. 38, par. 108-9 provides:

"In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:

(a) To protect himself from attack, or

(b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant."

The thrust of the statute is that by virtue of the authority to search the premises, it is sometimes permissible to search persons on those premises. The statute does not expressly state that the officer must have probable cause to believe one on the premises possesses a weapon or the items described in the warrant. However, the language "reasonably detain to search" suggests that the officer must be prepared to show some reason to suspect that the person on the premises might attack him or attempt to dispose of or conceal items named in the search warrant. (*People* v. *Dukes* (1977), 48 Ill. App. 3d 237, 363

N.E.2d 62.) An additional requirement, not apparent from the face of the statute but implied by decisional law, is some showing that the person searched have some connection with the premises. *People* v. *Campbell* (1979), 67 Ill. App. 3d 748, 753, 385 N.E.2d 171; *People* v. *Dukes.*

In applying this statute to the case at bar, we must also consider the relative timing of the apartment search and defendant's non-voluntary entry. The Committee Comments to section 108-9 recognize that the need for a search usually arises "* * * when the officer first arrives at the place where the goods are to be seized." Further language is also instructive:

> "* * * The need for this power arises most often in the narcotics cases where disposition is most easily effected.
>
> * * *
>
> "* * * Furthermore, if a judge decides there is probable cause for issuing the warrant in the first place, then this power given to the officer which is parasitic to the warrant should not be considered excessive in the hands of the executing officer." Ill. Ann. Stat., ch. 38, par. 108-9, Council Commentary, at 271 (Smith-Hurd, 1973).

However, to ensure that the power given the executing officer is not excessive, the timing of a search pursuant to the statute must be strictly construed. (*People* v. *One 1968 Cadillac Automobile* (1972), 4 Ill. App. 3d 780, 281 N.E.2d 776.)

> "* * * The statute does not grant to police the power to search someone at their leisure. The need for the search is immediate, and it must be conducted at the earliest opportune moment after the danger presents itself. * * *"
>
> 4 Ill. App. 3d, at 787, 281 N.E.2d, at 781.

Moreover, the language "may reasonably detain to search" must be strictly construed in light of the teaching of the United States Supreme Court in *Delaware* v. *Prouse* (March 27, 1979), 47 U.S.L.W. 4323, and *Terry* v. *Ohio* (1968), 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889. *Terry* and *Prouse* indicate that a

detention is a "seizure" within the meaning of the fourth amendment even when the purpose of the stop is limited and the resulting detention is quite brief. Accordingly, when defendant and Charles were "invited" into the apartment at gunpoint and made a non-voluntary entry, their detention constituted a seizure within the meaning of the fourth amendment. Officers Johnson and Gibson both testified that defendant was not free to leave.

Classifying defendant's detention as a "seizure" does not end our inquiry, however. The fourth amendment only prohibits unreasonable searches and seizures. The reasonableness, and hence the permissibility, of a particular law enforcement practice is judged by balancing the intrusion on an individual's fourth amendment interests versus promotion of a legitimate government interest. (*Delaware* v. *Prouse* (March 27, 1979), 47 U.S.L.W. 4323.) In accordance with the teaching of *Terry* and *Prouse,* we construe the language "reasonably detain to search" to require that the executing officer can express at least an articulable and reasonable suspicion that either a search or a detention (or both) is for an enumerated purpose of section 108-9. By this requirement the courts will be provided with a record containing specific articulable facts which, together with rational inferences from those facts, will indicate whether either of the twin functions of section 108-9 is met and, accordingly, whether either the search or the seizure (or both) is reasonable. *Delaware* v. *Prouse; Terry* v. *Ohio.*

Applying these principles to the facts of the instant case, we conclude that the seizure and search of defendant were unreasonable and did not comport with the requirements of section 108-9. Initially, strict compliance with the statute only enables detention and search of any person on the premises at the time the warrant is executed. The trial court found that the search had been completed. This finding is supported by Harris' testimony that the search ended 30 to 45 minutes prior to defendant's arrival. Nonetheless, the trial court believed that

since the police were still on the premises for the lawful purpose of taking the Harrises into custody, the statute was satisfied. Such an expansive reading of section 108-9, however, contravenes its purpose as indicated by the Committee Comments: The need for a search arises " * * * when the officer first arrives at the place where the goods are to be seized." Ill. Ann. Stat., ch. 38, par. 108-9, Council Commentary, at 271 (Smith-Hurd, 1973).

The trial court's belief that *People* v. *Pugh* (1966), 69 Ill. App. 2d 312, 217 N.E.2d 557, was dispositive was erroneous since that case is distinguishable. In *Pugh,* defendant was admitted at the direction of the officers while the search of the premises was in progress. His detention and search occurred about fifteen minutes after the officers entered the apartment and before the officers had discovered any contraband in the apartment. The *Pugh* court further indicated that:

> " * * * We agree with the State that the execution of search warrants in narcotics cases is a risky business at best, and unless the police search all the persons present on the premises they endanger both themselves and the search they are making. Furthermore, the entry of the defendant onto premises where the police have reason to believe narcotics are concealed provides further grounds for his search. * * * "
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> 69 Ill. App. 2d, at 316; 217 N.E.2d, at 559.

The circumstances in the instant case differ since the premises had been thoroughly searched, handguns and narcotics had already been recovered, and the residents had been arrested. The officers' reliance on section 108-9 was not well founded because its purpose had been attained by their successful execution of the warrant and the ensuing arrests. *Pugh* is also distinguishable because there is some indication that Raymond Pugh was the brother of Jessie Pugh, the resident named in the warrant. See *People* v. *Campbell* (1979), 67 Ill.

App. 3d 748, 750, 385 N.E.2d 171. Defendant's connection with the premises described in the warrant is not apparent.

The State contends that the requisite connection was established through Harris' testimony that he had known the defendant and Charles for one to one and one-half years. They had previously visited his apartment and on at least one occasion had been there at 3 to 4 a.m. Clearly, defendant and Charles had a greater connection with the premises than the defendant in *People* v. *Dukes* (1977), 48 Ill. App. 3d 237, 363 N.E.2d 62. Dukes was an innocent stranger who had mistakenly entered premises being searched. Defendant and Charles were guests and acquaintances of the Harrises. However, the *Dukes* court indicated that connection with the premises may mean more than a social guest:

> " * * * [T]he record articulates no facts indicating that the defendant had any connection with the premises described in the warrant. The defendant was not on the premises when the police officers arrived to execute the warrant, nor does it appear that the defendant lived on the premises or was related to anyone who lived there."
> 48 Ill. App. 3d, at 240, 363 N.E.2d, at 64.

See also W. LaFave, *Search and Seizure: Course of True Law,* 1966 U. of Ill. Law Forum 255, at pp. 271-273 (concerning the requirement of connection with the premises). Compare *People* v. *Campbell* (1979), 67 Ill. App. 3d 748, 385 N.E.2d 171 (defendant, who was a resident of the premises and entered without knocking while police were conducting a search, deemed to have sufficient connection with the premises).

Moreover, the record fails to indicate that the officers knew defendant had sufficient connection with the premises. Johnson testified that Charles was asked who he was, why he was there and whether he lived there. His response, if any, and any questioning of defendant are not of record. Gibson testified

that Charles told him he had come to see Carolyn Harris. Even if we accept the officer's testimony in a light most favorable to the State, defendant was merely a visitor arriving after a completed search. Accordingly, under these circumstances, we find that defendant lacked sufficient connection with the premises to justify her seizure and search.

We turn next to the twin purposes of section 108-9 to review whether the officers complied with the "reasonably detain to search" language of the statute. In other words, we review the record to see if the officers manifested specific articulable facts which, together with rational inferences from those facts, indicated the necessity to protect themselves from attack or to prevent disposal or concealment of contraband described in the warrant.

The State contends that the police reasonably believed that defendant might attack them. They had discovered three handguns in the apartment prior to the arrival of defendant and Charles and had found a weapon on Charles. However, at the point when defendant and Charles were "directed" to enter the apartment, Officer Gibson had his service revolver drawn and pointed. Johnson's testimony, reported above in pertinent part, clearly indicates that he was never in fear for his safety. He explained that he believed he could maintain physical control over defendant so long as he did not turn his back on her. Gibson testified he was apprehensive and cautious because handguns had previously been recovered. Yet, since he had his service revolver drawn, it is apparent that he, too, was in control. Both officers indicated they did not turn their backs on defendant and kept close proximity to her. Defendant made no furtive movements to indicate to the officers that they might be in danger.

Furthermore, in light of the trial court's opinion that Johnson and Gibson were not credible witnesses, we doubt the validity of their testimony that defendant may have had a gun

stored in the crotch of her pants. Johnson indicated that the bulge was pointed and might have been a weapon. Gibson testified the bulge was half-moon shaped and large. In short, we agree with defendant that the officers' testimony concerning the bulge in her crotch area is hardly consistent with the possibility of a concealed weapon. Accordingly, we find the record does not support a finding that the officers reasonably suspected an attack.

Finally, we also conclude that there is no showing that the police reasonably suspected defendant would destroy or conceal items described in the warrant. The State concedes that the record is silent as to whether either officer believed that defendant possessed any narcotics named in the warrant or might attempt to conceal or dispose of such items. Nonetheless, the State contends there is circumstantial justification for a reasonable belief that defendant was engaged in narcotics activities. Narcotics had been recovered from Carolyn Harris. Defendant and Charles knew the Harrises and had previously visited them. This visit occurred at about 3 a.m. and the police observed a bulge in defendant's pants.

We do not agree. Defendant was not even on the premises when the officers entered and began their search. When she did enter, the premises had been thoroughly searched, evidence gathered and the perpetrators handcuffed. The Committee Comments indicate that the need to search individuals not listed in the search warrant for items described in the warrant arises when the officers first arrive and execute the warrant. Accordingly, since the warrant had been successfully executed, there was no showing defendant would destroy or conceal items described in the warrant.

For the foregoing reasons, we find the detention to search defendant was unreasonable and we reverse the order of the circuit court of Cook County denying defendant's motion to

quash arrest and suppress physical evidence. Because defendant's arrest is quashed and because the sole evidence against defendant is evidence found as a result of the search, the judgment of conviction must be reversed. *People* v. *Bowen* (1963), 29 Ill. 2d 349, 194 N.E.2d 316, *cert. denied* (1964), 376 U.S. 927.

Reversed.

McGLOON and CAMPBELL, JJ., concur.